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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~338.~~ 77.

JAMES B. HOWARD, PLAINTIFF IN ERROR,

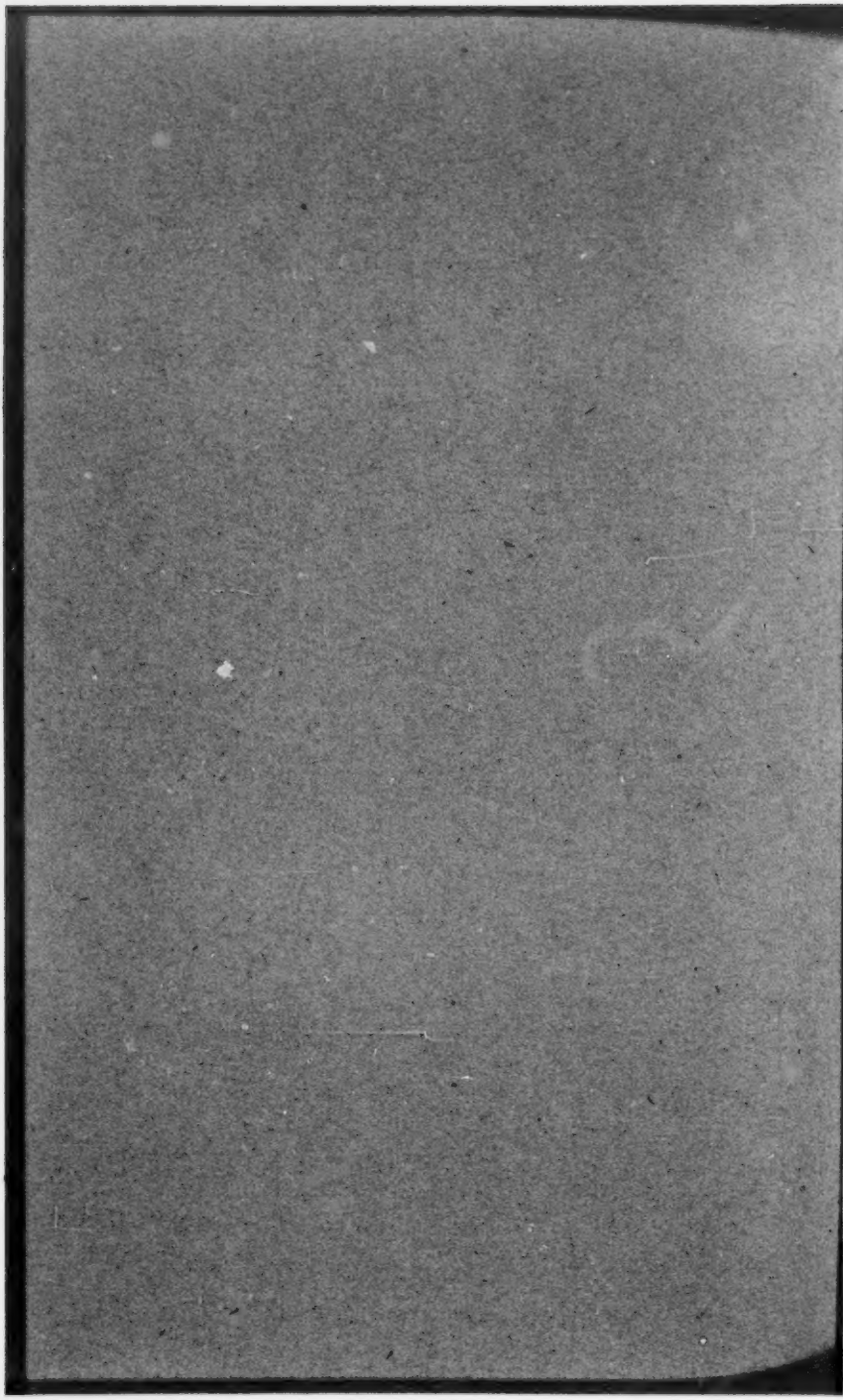
vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED AUGUST 8, 1904.

(19,438.)



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a Please before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, Kentucky, on the 22nd day of April, 1904.

JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from the Franklin Circuit Court.

Be it remembered that heretofore towit, on the 29th day of June 1903 the appellant by his attorney filed in the clerk's office of the court of appeals a transcript of the record in words and figures following towit:

b Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant. } Transcript of Record.

Pleas before the Hon. James E. Cantrill, judge of the Franklin circuit court, in the above entitled prosecution.

1 Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY
vs.
HENRY YOUTSEY, JAMES HOWARD, Berry Howard, Harlan Whittaker, and Richard Combs. } Indictment for Wilful Murder.

The grand jury of the county of Franklin, in the name and by the authority of the Commonwealth of Kentucky, accuse Henry Youtsey, James Howard, Berry Howard, Harlan Whittaker and Richard Combs of the crime of wilful murder, committed as follows, viz:

The said Henry Youtsey, James Howard, Berry Howard, Harlan Whittaker, Richard Combs and others then and there acting with them, but who are to this grand jury unknown, in the said county of Franklin, on the 30th, day of January, A. D. 1900, and before the finding of this indictment, unlawfully, wilfully, feloniously, of their malice aforethought and with intent to kill, did, kill and murder William Goebel by shooting and wounding him with a gun or pistol loaded with powder and other explosives and leaden and steel ball and other hard substances and from which said shooting and wounding the said Goebel died on the third (3rd) day of February, 1900: and the aforesaid grand jury does further charge that one of the above named defendants, or another person than and

there acting with them but who is to this grand jury unknown
2 did, so as aforesaid, then and there kill and murder said Goebel and the other of said defendants did then and there counsel, advise, assist, aid and abet same, but which so actually fired the shot and which so counseled, advised, aided and abetted therein is to this grand jury unknown, against the peace and dignity of the Commonwealth of Kentucky.

ROB'T B. FRANKLIN,
Commonwealth's Attorney, 14th Circuit Court District.

Witnesses: Dr. James R. Ely, D. Meade Woodson, John P. Chinn, Silas Jone, Dr. T. R. Welch, Dr. John South, John E. Miles, Wingate Thompson, B. G. Williams, John Ries, Will Triplett, Dick Tobin, Pat. McDonald, E. T. Lillard, Miss Emma Scott, James F. Dailey, F. H. Bowman, Miss Sallie Jackson, Newton Frazier, Chas. G. Bowman, John M. Riddle, Howell Scott, S. E. Rigg, Dudley Williamson, R. L. Blakeman, Dee Armstrong, George Alexander, Wade H. Watts, F. W. Golden, T. B. Cromwell, George Russell, F. M. Hurst, L. C. Norman, W. S. Park, J. S. Moore, W. L. Pence, T. N. Lindsey, George W. Scott, W. H. Lancaster, William Watkins, A. G. Packham, J. D. Vaughan, W. B. Bridgeford, Courtland Chenault, Henry Ware, E. F. Baker, J. F. Noonan, David Davis, R. C. King, L. F. Sin Clair, G. R. Hemphill, I. N. Green, McKenzie R. Todd, Miss Anna Wiest,
3 S. T. Pence, James Eggleston, George G. Fetter, Charles Wm. Howard, J. F. Hawn, W. S. Millinder, William Smoot, J. B. Mathews, James H. Marrs, William Henry Jones, W. W. Alcoke, W. E. Scott, C. I. Caufield, H. D. Harrod, Howard Johnson, Rev. M. B. Adams, John Brown, Louis D. Smith, Mrs. Albert Kirtley, Mrs. Viola Howell, George Robinson, George Coffee, B. F. Suter, John Suter, J. K. Lewis, J. E. Canfield, J. W. Napier, F. H. Johnson.

(Endorsed on back:) No. 432. The Commonwealth of Kentucky *vs.* Henry Youtsey, James Howard, Berry Howard, Harlan Whittaker, Richard Combs. Indictment for wilful murder.

A true bill.

R. H. SUTER,
Foreman Grand Jury.

Presented to the Franklin circuit court by the foreman of the grand jury in the presence of the grand jury and filed in open court this 17th day of April, 1900.

THOS. B. FORD,
Clerk Franklin Circuit Court.

4 Franklin Circuit Court, January 31st, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES HOWARD. } Order. Murder.

On motion of the attorney for the Commonwealth it is ordered that the mandate of the court of appeals herein, filed in the clerk's office on January 21st, 1903, be and the same is now noted as filed of record.

Franklin Circuit Court

Filed in Office Jan'y 21, 1903.

Filed of Record Jan'y 31, 1903.

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, Dec'r 17, 1902.

JAMES HOWARD, Appellant,
against
COMMONWEALTH OF KY., Appellee. } Appeal from a Judgment of the Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded with direction to award appellant a new trial and for further proceedings consistent with the opinion.

Which is ordered to be certified to said court.

5 S. J. SHECKELFORD, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Issued January 20th, 1903.

Franklin Circuit Court. In Chambers, March 31st, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES HOWARD. } Order.

It appearing to the satisfaction of the undersigned from information furnished by Commonwealth's attorney that Ella Robinson, who resides in Oklahoma City, Oklahoma, and James Stubblefield, who resides at Cincinnati, Ohio, and F. W. Golden, who resides at Denver, Colorado, and Robert Allen, who resides in Indiana, are

witness- for the Commonwealth of Kentucky in the above styled prosecution and that the testimony of each of said witnesses is material to the Commonwealth.

It is now ordered that said witnesses be and they are hereby requested to attend the Franklin circuit court on the first day of its April term 1903, at Frankfort, Ky. and each of said witnesses shall upon his attendance be allowed in addition to his per diem, his actual necessary expenses.

6 Given under my hand as judge of the 14th circuit court district of Kentucky, this March 31st, 1903.

(Signed) JAS. E. CANTRILL,
Judge of 14th Circuit Court, District of Kentucky.

Franklin Circuit Court, April 6th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES HOWARD. } Order.

Ordered that A. G. Jeffers, sheriff of Franklin county Ky. proceed at once to Georgetown, Kentucky, and bring the defendant, James B. Howard, to Frankfort and deliver him to the jailer of Franklin county.

It is further ordered that the jailer of Scott county deliver said defendant James B. Howard, to said Sheriff A. G. Jeffers, upon the presentation to him by said A. G. Jeffers, sheriff of a copy of this order.

7 Franklin Circuit Court, April 7th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES HOWARD. } Order.

Ordered that attachments issue, returnable forthwith, for the following absent witnesses for the Commonwealth: To Franklin county for Dudley Williamson; to Jefferson county for Bennett H. Young; to Clay county for John M. Collins, Pete Philpot, William Barrett, Steve Barrett, John C. White and Abel Bishop; to Laurel county for Jim Collier, Wm. Greene and Laura Mullins; to Perry county for Wesley A. Whittaker; to Letcher county for D. D. Fields; to Bell county for Gilbert Garrard; to Fayette county for C. C. Calhoun and to Jackson county for E. W. Johnson.

Franklin Circuit Court, April 8th, 1903.

SAME
vs. } Order.
SAME.

Came the Commonwealth's attorney and filed a copy of the notice of motion for a change of venue herein, and moved that same be made a part of the record, which motion was sustained and said notice is made a part of the record herein.

8 Defendant James Howard filed his affidavit and entered his motion for a continuance herein to the next term of this court, to which motion the plaintiff objected and offered to file the affidavit of B. G. Williams as to the residence of witness George Hemphill, whose statement was embraced in defendant's affidavit for a continuance. The defendant objected to the filing of the affidavit of said Williams, and the court being advised, overruled said objection and permitted said affidavit to be filed, to which defendant excepted; thereupon the plaintiff offered to admit said affidavit to be read as the deposition of all *fo* said witnesses contained in said affidavit subject to exception for relevancy and competency, except as to H. C. Robinson as to whom the court ruled that the defendant had not shown proper diligence, and as to George Hemphill, who was not shown to be in the State of Kentucky, or subject to the jurisdiction of the court; thereupon the court overruled the defendant's motion for a continuance, to which ruling, refusing the continuance, and to the ruling of the court excluding the statement of H. C. Robinson and George Hemphill, the defendant objects and excepts.

9 The defendant James B. Howard having been twice tried under this indictment in Franklin county, and the whole panel summoned and in attendance at this court having been exhausted and only one juror found qualified, and the court being satisfied that it would be impracticable to obtain a jury free from bias in Franklin county, it is now ordered that A. G. Jeffers, sheriff of Franklin county, with sufficient deputies, proceed to Woodford county and there summon a special venire of one hundred and fifty (150) qualified jurors, Woodford county being in which it appears to the court that there is the greatest probability of obtaining impartial jurors and said jurors so summoned are to appear at the court house in Frankfort, Kentucky, at 2 o'clock on the 9th of April, 1903.

Upon the court's directing a special venire to be summoned in this case from Woodford county, the defendant moved the court to require said jurors to be drawn from the drum or wheel in said county, as is required by law in the selection of jurors in said county when the regular panel is exhausted, and the court being advised, overruled said motion, to which the defendant excepts.

Franklin Circuit Court.

Filed April 8th, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES B. HOWARD, Defendant,
} Notice for Change of Venue.

To Robert B. Franklin, Commonwealth's attorney:—

10 You are hereby notified that on Tuesday, April 6th, in the Franklin circuit court at Frankfort, Ky., I will on said day, during motion hour, file my petition and make application in said court, for a change of venue of the above entitled prosecution, wherein I am charged with the killing of Gov. William Goebel, from the county of Franklin to some other adjacent county other than Scott county, and will then and there move the court to make such change of venue of said prosecution against me. The grounds for said motion will be based upon the facts stated in said petition and application.

I will accompany my petition and application with the necessary affidavits of two creditable witnesses as to each county, supporting said petition in accordance with the requirements of the statute, regulating such change of venue.

April 1st, 1903.

JAS. B. HOWARD,
By J. A. VIOLETT,
J. A. SCOTT,
Attorneys for Defendant.

(For affidavit of Howard for continuance see page 45 this record.)

11 Franklin Circuit Court.

Filed April 8th, 1903.

COMMONWEALTH OF KENTUCKY
against
JAMES B. HOWARD.

Affidavit of the Commonwealth on the court's inquiry as to the residence of George R. Hemphill, witness mentioned in defendant's motion for a continuance.

Affidavit B. G. Williams says that he has been connected with the prosecution of the cases growing out of the assassination of William Goebel since March, 1900, that he knows George R. Hemphill, and that said George R. Hemphill is not now a resident of the State of

Kentucky, nor has he been within fifteen months or two years past He says that upon at least three or four occasions since the pendency of these prosecutions, both the Commonwealth and different ones of the accused have endeavored to obtain the presence of said Hemphill, and have been unable to do so. He says that at one time since said prosecutions began Hemphill became or was a resident of the State of Indiana, and afterwards affiant was advised that he was in the city of Washington, D. C., and, desiring the presence of said Hemphill, they procured an order to be made by this honorable court requesting the attendance of said George R. Hemphill, and providing in said order that his expense *per diem* should be paid if he would come, but in every instance the Commonwealth was unable to procure his attendance, and so affiant says that said Hemphill does not now reside in Whitley county, nor is he within
12 the jurisdiction of this court, nor would the defendant be able to procure his attendance at the next ensuing term of this court as affiant believes.

B. G. WILLIAMS.

Subscribed and sworn to before me by B. G. Williams this 8th day of April, -903.

J. R. ELLIOTT, *Clerk.*

Franklin Circuit Court, April 8th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES HOWARD. } Order.

Ordered that Clarence E. Walker, be and he is hereby appointed official stenographer of this court in this case, whereupon said Clarence E. Walker appeared and took the oath required by law.

Franklin Circuit Court, April 8th, 1903.

SAME
vs.
SAME. } Order.

Ordered that attachments issue, returnable on the 12th
13 day of the present term of court for the following absent witnesses for the defendant, viz: To Harlan county for James Howard, Ans Low, B. F. Kelley, Wade Skidmore, James H. McKnight and Frank Gross; to Grayson county for H. E. James and Stuart Stone; to Lee county for Tallow Dick Combs; to Hardin county for F. M. Bowman; to Madison county for John D. Feeney and C. I. Ogg; to Montgomery county for I. N. Green; to Breathitt

county for Walter Day; to Laurel county for J. C. Clark, H. C. Thompson, G. C. Thompson, Judge W. L. Brown, Andrew Kinser; to Clay county for J. E. White, H. B. Marcum, J. F. Marcum, A. D. Roberts, H. G. Coldiron, T. C. Cundiff; to Monroe county for J. E. Leslie; to Knox county for Alferd Lunsford, Wm. Beard and Green Golden; to Whitley county for Minot Gaylor.

And alias subpœnas are hereby awarded to issue for the following witnesses for defendant herein, returnable on the 12th day of this term of court, viz: To Fayette county for Bev. White; to Harlan county for Isam Swillivan, Richard Gross and Albert Hilton; to Lee county for John Jones; to Madison county for Ben Rowe; to Breathitt county for H. C. Robertson; to Laurel county for Wm. Parsley, James Russell, H. C. Eversole, Ed. Parker, John E. Steele, Sid Lovelace and George Woodward; to Clay county for Chester Marcum; to Clark county for F. M. Poer and John C. Day; to Kenton county for John Davidson, R. R. Mann, Charles
14 Wolfe, George Wolfe, George F. Miller, and S. S. Shepherd: to Knox county for John Williams; to Letcher county for John D. Fugate and Judge W. H. Blair and B. F. Kelley; to Franklin county for Louis Smith, John Perkins, Wade Watts, Farmer Roberts, Parks B. Reynolds.

It appearing that of the regular panel of twenty-four jurors drawn at the last term of this court to do jury service at this the present term, fifteen of said panel appeared and answered to their names, and were tested and for cause excused, and it further appearing that of the remainder of said panel some had died, some were excused on the certificates of physicians stating they were by reason of sickness unable to attend court, and others were excused for reasons shown satisfactory to the court, and on motion of the attorneys for defendant that these facts be made to appear of record, it is so ordered by the court.

Franklin Circuit Court, April 10th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Order.

Ordered, on motion of Commonwealth's attorney, that alias subpœna issue to Madison county, Clarke county and to Montgomery for F. M. Poer returnable forthwith.

15 Franklin Circuit Court, April 10th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Order Rule.

Defendant James Howard filed in open court the letter of M. S. Baughman, sheriff of Lincoln county Kentucky, directed to James

A. Violett, of counsel for defendant, refusing to execute a subpœna issued herein for Dr. W. S. Phillips, requiring him to appear herein on the 3rd day of the present term, to testify in behalf of defendant, unless the fee therefor was paid; said subpœna having been delivered to said sheriff through the mail by said Violett, and was returned to said Violett with the letter of Baughman, which letter reads as follows, viz:

"STANFORD, KY., 4, 8, 1903.

Mr. Jas. A. Violett, Frankfort, Ky.

DEAR SIR: You failed to enclose my fee which you will please do and return, then you will receive prompt attention.

Very respt, M. S. BAUGHMAN, *S. L. C.*"

Thereupon the defendant moved the court for a rule against the said sheriff, directed to the jailer of Lincoln county, Ky.
16 requiring said sheriff to appear in this court on Monday the 13th day of April 1903 and show cause, if any he can why he should not be dealt with for contempt, in failing and refusing to execute the said subpœna delivered him for Dr. W. S. Phillips, witness for defendant herein.

Came the parties by their attorneys, and the defendant in person, who, waiving a formal arraignment, pleaded not guilty to the charges in the indictment herein, thereupon came a jury herein to-wit: A. R. Mauser, F. D. Redding, R. T. Renshaw, Henry Mehring, G. M. Jewell, Wm. Chapman, J. A. Burks, J. M. Prather, George Cox, Carter C. Neal, T. H. Mattingly, and W. B. Ford, who were sworn to well and truly try the issue and a true verdict render, and having heard a statement of the case by counsel for plaintiff and defendant, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

Franklin Circuit Court, April 10th, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES B. HOWARD, Defendant. } #432. Rule.

Defendant, James Howard, filed in open court the letter of M. S. Baughman, sheriff of Lincoln county, Kentucky, directed
17 to James A. Violett of counsel for defendant, refusing to execute a subpœna issued herein for Dr. W. S. Phillips requiring him to appear herein on the 3rd day of the present term, to testify in behalf of defendant, unless the fee therefor was paid; said subpœna having been delivered to said sheriff through the mail by said Violett, and was returned to said Violett with the letter of Baughman, which letter reads as follows, viz:

STANFORD, KY., 4/8/1903.

Mr. Jas. A. Violett, Frankfort, Ky.

DEAR SIR: You failed to enclose my fee which you will please do and return, then you will receive prompt attention.

Very respt., M. S. BAUGHMAN, *S. L. C.*

Thereupon the defendant moved the court for a rule against the said sheriff directed to the jailer of Lincoln county, Ky. requiring said sheriff to appear in this court on Monday the 13th day of April, 1903, and show cause, if any he can, why he should not be dealt with for contempt, in failing and refusing to execute the said subpœna delivered him, for Dr. W. S. Phillips, witness for defendant herein.

A copy.

Attest: J. R. ELLIOTT,
Clerk Franklin Circuit Court.

18 (*Jailer's Return.*)

Executed on the within named by delivering him a true copy of the within rule.

This April 11th, 1903.

W. J. HERRIN, *J. L. C.*

Franklin Circuit Court, April 10th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Order.

Commonwealth's attorney, Franklin came into court and in the presence of the accused and his counsel, stated that he had a matter he desired to bring to the attention of the court away from the presence of the jury; thereupon the court, counsel for the Commonwealth, the defendant in person and his counsel, retired to the county judge's office: Thereupon the attorney for the Commonwealth filed the affidavit of Ben F. Hackett, and, for reasons therein shown, moved the court to discharge juror, J. C. Alexander, from service as a juror on the trial of this case, to which motion defendant by counsel objected and, argument of counsel on both sides being heard upon the objection, it was agreed by counsel on either side that the court might, in the absence of defendant and counsel question the
19 said Alexander as to the truth of the said statements, contained in said Hackett's affidafit, that he said to said Hackett while in the custody of the sheriff, "Hello, Ben, I am glad they cut you off of this jury as I did not want to serve on this jury with you,"

and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of said Alexander was a violation of the admonitions of the court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now excused as a juror in this case, and he is now ordered to be discharged; and the court being thus advised, overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel excepts.

Thereupon defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court being advised, sustained said objection, and refused to discharge said entire panel, to which ruling defendant by counsel excepts.

Thereupon came defendant by attorney and filed a bill of exceptions, which was approved and signed by the court and made a part of the record without being spread at large upon the order book.

20 (For affidavit of Ben F. Hackett see page 61 this record.)
(For bill of exceptions Apr. 10—see page 62 this record.)

Franklin Circuit Court, April 11th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard a portion of the evidence for the plaintiff, were admonished by the court, placed in charge of the sheriff, and adjourned over until Monday morning at 9 o'clock.

Franklin Circuit Court, April 13th, 1903.

SAME
vs.
SAME. } Order.

Came the defendant, by attorney and filed a motion to require the Commonwealth's attorney to permit defendant or his attorneys to examine the written statement called confession of Henry E. Youtsey, also the notes of evidence given before the grand jury of
21 said Youtsey or to furnish said defendant with a copy of said papers, and in support of said motion, filed the affidavit herein of defendant, to which motion the plaintiff objected, and filed a statement of the Commonwealth's attorney herein and the court being advised, overruled said motion to which defendant excepted.

Came the defendant, by attorney and filed the response of M. S. Baughman, sheriff of Lincoln Co. Ky. to the rule theretofore issued against him on the 10th day of April, 1903, which response being considered is adjudged to be sufficient and said rule is now hereby discharged.

Ordered that the attachment awarded herein against Bennett H. Young of Jefferson county, be and the same is hereby discharged.

It appearing to the satisfaction of the court, from the affidavit this day filed by Rob't B. Franklin, Commonwealth's attorney, that an attachment is necessary in order to procure the attendance of witnesses herein named, it is now ordered that an attachment be and the same is granted, returnable forthwith, and requiring the immediate attendance, in the Franklin circuit court, as witnesses for the Commonwealth in the above styled action, of Lucien Morgan of Madison county; John E. Roberts, W. W. Baxter, Mat Morgan, Brandy Asher of Clay county, and also that attachments be granted at the same time to Laurel county and Rockcastle county
22 for W. W. Baxter, and D. M. Vaughan to Estill, Lee and Madison counties.

(For motion & affidavit of def't Apr. 13 see page 65 this record.)
(For statement of Commonwealth's att'y see page 68 this record.)

Franklin Circuit Court.

Filed April 13th, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES B. HOWARD, Defendant. } # 432. Response to Rule.

For response to the rule issued herein on the 10th day of the present month, the respondent M. S. Baughman, sheriff of Lincoln county, Kentucky, expressly disclaims any intent of wrongfully and unlawfully refusing to serve the process of this court. On the contrary, the respondent in good faith believed that he had the legal right to demand his fee in advance before serving a subpœna for a defendant sent from another county.

He has heard lawyers in whose ability he has confidence say that such was the law. In good faith believing that he had the legal right to demand his fee in advance, the respondent wrote a
23 polite note to defendant's attorney informing him that he had failed to enclose the fee and offering to serve the process promptly when the fee was sent. If it is the opinion of this honorable court that the respondent has no right to demand his fee in advance, he is ready and willing to serve said subpœna as soon as it is again placed in his hands.

Having fully answered, the respondent prays that the rule against him be discharged.

M. S. BAUGHMAN,
Sheriff Lincoln County, Ky.

Sworn to before me by M. S. Baughman, sheriff of Lincoln county, Ky., this 11th day of April 1903.

JAS. F. HOLDAM,
Clerk Lincoln Circuit Court.

Franklin Circuit Court, April 13th, 1903.

COMMONWEALTH OF KY.
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury heretofore sworn herein, who having heard a portion of the evidence for the Commonwealth were admonished by the court, placed in charge of the sheriff, and adjourned
24 over until tomorrow morning at 9 o'clock.

Franklin Circuit Court, April 14th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

Came the Commonwealth's attorney and moved the court to enter an order requesting George R. Hemphill, to appear for the defense and testify herein at this term of court at the expense of the Commonwealth which is ordered to be done.

Franklin Circuit Court, April 14th, 1903.

SAME
vs.
SAME. } Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard another portion of the testimony for the Commonwealth, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

25 Franklin Circuit Court, April 15th, 1903.

COMMONWEALTH OF KY.
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard another portion of the evidence for the plaintiff, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

Franklin Circuit Court, April 16th, 1903.

SAME
vs.
SAME. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, and on motion of the attorney for the Commonwealth, a *subpœna duces tecum* is awarded against the clerk of the Laurel circuit court, commanding him to appear forthwith in this court and bring with him all indictments, criminal dockets, order books and records of said Laurel circuit court, showing the pendency and disposition of all criminal prosecutions in said
26 court during the year 1900.

Comes the defendant, James B. Howard, and files his affidavit herein and moves the court to set aside the swearing of the jury in this cause herein, and the case be continued until the next term of this court; and he makes this motion in order that he may have a fair trial of his cause herein, to which motion the Commonwealth's attorney objected, and the court being advised, sustained the objection and overruled the motion to set aside the swearing of the jury and to continue this cause, to which ruling of the court the defendant excepted; and the jury having heard a portion of the evidence for the plaintiff, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

(For motion see page 69 of this record.)
(For affidavit see page 69 of this record.)

Franklin Circuit Court, April 17th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

It appearing from information that Wesley A. Whittaker
27 is now confined in the Breathitt County jail, and that he is a witness on behalf of the Commonwealth in the above entitled

prosecution, now, on motion of the Commonwealth's attorney, it is ordered that the jailer of Breathitt county deliver said Wesley A. Whittaker to the sheriff of Breathitt county, and that said sheriff convey said Whittaker forthwith from Breathitt county to Franklin county and deliver him to this court.

Came the parties by their attorneys, and the defendant in person, came also the jury herein, who having heard the balance of the evidence for the plaintiff, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

Came the defendant in person and by attorney. The attorney for the Commonwealth moved the court to withdraw from the consideration of the jury the following questions to and answers of Frank Cecil, to-wit: Beginning with the word "by" in line 22, page 515 and including the following:

By Mr. FRANKLIN: Don't you know that Brantly Smith who was summoned here as a witness on the Berry Howard case has been shot by a deputy United States marshal, the subject matter of the difficulty being his interest on behalf of the Commonwealth in this matter, in the court-house at Pineville?

28 Question objected to by the defendant—objection overruled to which the defendant, by counsel, excepted.

By the COURT: "I think you went most too far—I cannot allow one side to have full latitude without allowing the same to the other side."

A. Yes sir; he was shot up there by Jim Horine, a deputy United States marshal, and the general talk is, I was not by, that he was shot because he was witness down here against Berry Howard and helped arrest Berry.

A. Don't you know that the same man on the same occasion attempted to shoot Ike Hopkins, who had testified in one of the cases?

A. Horine told me that he aimed to shoot Ike.

The answer was objected to and the objection overruled to which defendant excepted.

Q. Ain't it a fact that Berry Howard and others, who has interested themselves in defence of these cases, have made it their business, and have you not, yourself, talked threateningly and done everything that could be done to intimidate witnesses for the Commonwealth and keep them from coming here to testify in any of these cases?

Question objected to by defendant—objection overruled—to which the defendant by counsel excepted.

29 A. I don't know what Berry Howard has done. I know when there was witnesses coming backwards and forwards I always tried to keep them away."

Ending with the word "away" in line 4 page 517.

The defendants made objection, but in person and by counsel, consented to said motion, and it is now so ordered.

Defendant moved the court to exclude the following statement made by H. E. Youtsey, and which is found on page 684 of the stenographic report of evidence, to-wit: "The only promise I had *which was made to me, was made by Mr. James Andrew Scott was* that I was to receive $35,000 for seven convictions and that I was not to tell anybody else the facts in the case, especially not Mr. Franklin, because he could not keep a secret, he would tell everybody."

Because said answer is not responsive to the question and is irrelevant and incompetent and the Commonwealth agreeing, it *it* so now ordered.

30 Franklin Circuit Court, April 18th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard a portion of the evidence for the defendant were admonished by the court, placed in charge of the sheriff and adjourned over until Monday morning at 9 o'clock.

Franklin Circuit Court, April 20th, 1903.

SAME
vs.
SAME. } Murder. Order.

Witness for defendant, T. C. Cundiff, appeared in court and it is now ordered that the attachment herein against him be discharged at defendant's cost.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard another portion of the evidence for defendant, were admonished by the court, placed in charge of the sheriff and adjourned over until to-morrow
31 morning at 9 o'clock.

Franklin Circuit Court, April 21, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard another portion of the

evidence for the defendant, were admonished by the court, placed under the charge of the sheriff, and adjourned over until to-morrow morning at 9 o'clock.

Franklin Circuit Court, April 22nd, 1903.

SAME
vs. } Murder. Order.
SAME.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard another portion of the evidence for the defendant, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

32 On motion of the attorney for the Commonwealth, George R. Hemphill was recognized in the penalty of $500.00 to appear and testify for the Commonwealth in the case of Commonwealth of Ky. *vs.* Caleb Powers, in the Scott circuit court, on the 2nd. day of its May term 1903.

Franklin Circuit Court, April 23rd, 1903.

COMMONWEALTH OF KENTUCKY
vs. } Murder. Order.
JAMES B. HOWARD.

On motion of the defendant, by counsel, a *subpœna duces tecum* is awarded against C. B. Hill, secretary of state of the Commonwealth of Kentucky, to appear forthwith in this court, and bring with him the "pardon record."

And on motion of the attorney for the Commonwealth, the said secretary of state will also bring with him all papers applying for pardon of James B. Howard now on file in his office.

On motion of defendant it is ordered that an attachment issue, returnable forthwith, to Lincoln county, Ky. for Dr. W. S. Phillips, absent witness for the defendant; and also to Franklin county, Ky., returnable forthwith, for Chas. Reynolds, absent witness for the defendant.

33 Came the defendant, by counsel, and filed the affidavit of James B. Howard, defendant herein, and proved the court to permit him to re-examine witness Henry E. Youtsey, to which motion the attorney for the Commonwealth objected, and said motion being heard was overruled by the court, to which ruling defendant excepted.

Defendant presented and offered his bill of exceptions herein, which was examined and signed by the court, and ordered to be

filed and made part of the record herein, without being spread at large upon the order book.

It is ordered that the indictment No. 442 of Commonwealth of Ky. *vs.* Green Golden be copied into and made part of the record herein, to which defendant excepted.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard another portion of the evidence for defendant, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

(For affidavit see page 72 of this record.)
(For bill of exceptions see page 73 of this record.)

34 Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY *vs.* GREEN GOLDEN. } Indictment for Being Accessory Before the Fact to the Wilful Murder of William Goebel.

The grand jury of the county of Franklin, in the name and by the authority of the Commonwealth of Kentucky, accuse Green Golden of the crime of being accessory before the fact to the wilful murder of William Goebel, committed as follows, viz:

The said Green Golden, in the said county of Franklin, on the 30th. day of January, A. D. 1900, and before the finding of this indictment, unlawfully, wilfully, feloniously, and of his malice aforethought and with intent to bring about the death and procure the murder of William Goebel, did conspire with Caleb Powers, F. W. Golden, John Davis, John L. Powers, William H. Culton, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whittaker, Richard Combs and others to this grand jury unknown, and did counsel, advise, encourage, aid and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whittaker, Richard Combs, and other persons to this grand jury unknown, unlawfully, wilfully, feloniously, and of their malice aforethought, to kill
35 and murder William Goebel, which, one of the last five above named persons or another person acting with them but who is to this grand jury unknown, so as aforesaid then and there, thereunto by the said Green Golden before the fact counselled, advised, encouraged, aided and procured, did by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel ball and other hard substances, from which said shooting and wounding the said Goebel died on the third day of February, 1900, but which of said last above mentioned persons, so as aforesaid, actually fired the shot that killed the said

Goebel is to this grand jury unknown, against the peace and dignity of the Commonwealth of Kentucky.

ROB't B. FRANKLIN,
Commonwealth's Attorney, 14th Circuit Court District.

Witnesses: Dr. James R. Ely, D. Meade Woodson, John P. Chinn, Silas Jones, Dr. T. R. Welch, Dr. John South, John E. Miles, Wingate Thompson, B. G. Williams, John Ries, Will Triplett, Dick Tobin, Pat McDonald, E. T. Lillard, Miss Emma Scott, James F. Dailey, F. M. Bowman, Miss Sallie Jackson, Newton Frazier, Charles G. Bowman, John M. Riddle, Howell Scott, S. E. Rigg, Dudley Williamson, R. L. Blakeman, Dee Armstrong, George Alexander, Wade H. Watts, F. W. Golden, T. B. Cromwell, George Russell, F. M. Hurst, L. C. Norman, W. S. Park, J. S. Moore, W. L.
36 Pence, T. N. Lindsey, George W. Scott, W. H. Lancaster, William Watkins, A. G. Packham, J. D. Watson, R. A. Vaughn, W. B. Bridgeford, Courtland Chenault, Henry Ware, E. F. Baker, J. F. Noonan, David Davis, R. C. King, L. F. Sin Clair, I. N. Green, G. R. Hemphill, McKenzie R. Todd, Miss Anna Weist, S. T. Pence, James Eggleston, George G. Fetter, Charles William Harrod, J. F. Hawn, W. S. Millinder, William Smoot, J. B. Mathews, James H. Marrs, William Henry Jones, W. W. Allcoke, W. E. Scott, C. I. Caufield, H. D. Harrod, Howard Johnson, Rev. M. B. Adams, John Brown, Louis D. Smith, Mrs. Albert Kirtley, Mrs. Viola Howell, George Robinson, George Coffey, B. F. Suter, John Suter, J. K. Lewis, J. E. Canfield, J. W. Napier, F. H. Johnson, Z. T. Thomasson, Richard Troxell.

(Endorsed on back:) Commonwealth of Kentucky *vs.* Green Golden. Indictment for being accessory before the fact to the wilful murder of William Goebel.

A true bill.
R. H. SUTER,
Foreman Grand Jury.

Presented to the Franklin circuit court by the foreman of the grand jury in the presence of the grand jury and filed in
37 open court this 19 day of April, 1900.

T. B. FORD,
Clerk Franklin Circuit Court.

Franklin Circuit Court, April 24th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard the conclusion of the

evidence in chief for the defendant, and part of the ev 'ence of the Commonwealth in rebuttal, were admonished by the art, placed in charge of the sheriff and adjourned over until tomor . morning at 9 o'clock.

Franklin Circuit Court, April 25th, 1903.

SAME
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard the conclusion
38 of all the evidence herein, were admonished by the court and placed in the charge of the sheriff and, accompanied by the court, viewed the grounds of the State capitol, and on their return into court were again admonished by the court, placed in charge of the sheriff and adjourned over until Monday morning at 9 o'clock.

Franklin Circuit Court, April 27th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

Came the defendant by attorney and filed a motion to strike from the testimony of Henry E. Youtsey certain parts thereof, and also to strike from the testimony of Frank Cecil certain parts thereof.

Defendant also filed a motion to strike out all the testimony of the various witnesses heard herein of statements made by parties other than defendant and not in the presence or hearing of said defendant, James B. Howard.

Defendant also filed a motion to exclude the testimony of Charles Day, and also the evidence of D. A. Jones herein.

To all three of the above motions the attorney for the Commonwealth objected which objections being heard were to each motion sustained by the court, and said motions were all overruled,
39 to which rulings of the court the defendant excepted.

Defendant offered five instructions which were refused by the court, to which ruling defendant excepted.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard the instructions of the court and argument by Hon. Carlo Little on behalf of the defendant and B. G. Williams, Esq. of counsel for the Commonwealth, were admonished by the court, placed in charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

(See motion to strike from the testimony fo- Youtsey on page 75 of this record)

(See motion to strike all of the testimony of the various witnesses of statements made by parties other than defendant on page 77 of this record)

(See motion to exclude the testimony of Chas. Day and D. A. Jones page 76 of this record)

(See refused instructions on page — of this record)

Franklin Circuit Court, April 28th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

40 Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard Mr. Smith on behalf of the defendant, Mr. Campbell on behalf of the Commonwealth and Mr. Violett on behalf of the defendant argue the case were admonished by the court, placed in the charge of the sheriff and adjourned over until tomorrow at 9 o'clock.

Franklin Circuit Court, April 29th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD. } Murder. Order.

Came the parties by their attorneys and the defendant in person, came also the jury herein, who having heard the arguments of counsel concluded, the cause was submitted to them, and they were admonished by the court, placed under the charge of the sheriff and adjourned over until tomorrow morning at 9 o'clock.

Franklin Circuit Court, April 30th, 1903.

SAME
vs.
SAME. } Murder. Order.

41 Came the parties by their attorneys and the defendant in person, came also the jury herein, who returned into court the following verdict, to-wit:

"We, the jury find the defendant guilty and fix his punishment at life imprisonment, this April 30th, 1903.

GEORGE M. JEWELL, *Foreman.*"

Franklin Circuit Court, May 2nd, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD
} Murder. Order.

Wesley A. Whittaker having testified as a witness for the Commonwealth it is now ordered that J. E. Spicer, deputy sheriff of Breathitt county, come again and take said Whittaker and deliver him back into the custody of the jailer of Breathitt county at Jackson Ky.

Came the parties by their attorneys and the defendant in person, the defendant, by attorney, filed his motion and grounds for a new trial herein; and in support of said motion filed the affidavits of W. L. Graddy, L. C. Wafford, H. F. Johnson and James B. Howard, to which motion the attorney for the Commonwealth objected and in support of said objection offered to file the affidavits of Carter C. Neal, R. B. Franklin and B. G. Williams; J. L. Bohannon; Arthur Sublett; J. L. Bohannon and E. P. Bunton; E. P. Bunton and J. L. Bohan-
42 non; A. G. Jeffers, to the filing of which affidavits the defendant objected, and the court overruled said objection and permitted said affidavits to be filed, to which the defendant excepted.

Defendant James Howard filed his own affidavit and moved the court to give him time to prepare affidavits or introduce witnesses as the court may require, to meet the statements and insinuations contained in the counter-affidavits filed by the Commonwealth.

To which last motion the attorney for the Commonwealth objected, and said objection being heard was sustained, and the said motion was overruled, to which the defendant excepted.

Thereupon the motion for a new trial herein being heard, and the court advised, overruled said motion, to which the defendant excepted, and prayed an appeal to the court of appeals which is granted.

Thereupon the defendant moved the court to require that the transcript for an appeal herein be furnished him without pay, and filed his affidavit in support of said motion; which motion being heard was overruled by the court, to which defendant excepted.

The defendant was this day brought into court and being informed of the nature of the indictment, plea and verdict, was asked
43 if he had any legal cause to show why judgment should not be pronounced against him; and none being shown, it is adjudged that the defendant be taken by the sheriff of Franklin county to the State penitentiary and there confined at hard labor for the period of his natural life.

Ordered that the above judgment be, and the same is hereby suspended for the period of sixty days.

Thereupon came defendant and tendered his bill of exceptions herein, which was examined, signed and approved by the court, and

ordered to be made a part of the record herein without being spread at large upon the order book.

Ordered that A. G. Jeffers, sheriff of Franklin county, convey the defendant to Georgetown, Kentucky, and deliver him to the jailer of Scott county.

(For motion & grounds for new trial see page 84 this record.)
(For affidavit of W. L. Graddy see page 96 this record.)
(For affidavit of B. C. Wafford see page 94 this record.)
(For affidavit of H. F. Johnson see page 93 this record.)
(For affidavit of Carter C. Neal see page 98 this record.)
(For affidavit- of R. B. Franklin & B. G. Williams see page 106 this record.)
(For affidavit of J. L. Bohannon see page 104 this record.)
44 (For affidavit- of Arthur Sublett, J. L. Bohannon and E. P. Bunton see page 103 this record.)
(For affidavit- of E. P. Bunton & J. L. Bohannon see page 105 this record.)
(For affidavit of A. G. Jeffers see page 102 this record.)
(For affidavit of James B. Howard in support of motion in regard to time to prepare counter affidavits see page 107 this record.)
(For affidavit of James B. Howard in regard to transcript for appeal see page 109 this record.

45 COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, ETC., Defendants. } Bill of Exceptions.

Be it remembered, that on the calling of this case for trial the attorney for the Commonwealth announced ready and the defendant announced not ready, for trial on the account of the absence of witnesses, and asked the court to pass the case until the next morning (Wednesday, April 8th. 1903) to see if they could be ready for trial, and the court being advised granted the time asked for, by the defendant until the next morning. Upon the calling of the case for trial on Wednesday April 8th. 1903, the defendant filed his affidavit herein and asked for a continuance which is as follows:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Affidavit.

The defendant, Jas. B. Howard, says he is not ready for trial at the present term of this court, owing to the absence of the following named witnesses;

H. C. Robinson, Ed. Parker, George R. Hemphill, Jas. Russell, Estill Roberts, W. F. Phillips, George F. Miller, Charles Wolfe, F. M.

Poer, S. S. Sheppard, John Davis, Jr. Wm. Parsley, John Davis, Sr. George Wolfe, Harvey Jones. Defendant and affiant says
46 that on the 26th day of March 1903 he caused a subpœna to be issued by the clerk of this court *court* directed to the sheriff of Breathitt county, the county of the residence of H. C. Robinson, requiring him to attend here as a witness on behalf of the defendant in the above styled action; on the 2d. day of the present, April term of this court; that he immediately placed same in the hands of the said sheriff of Breathitt county, who on April 3d. 1903, returned said subpœna "Not found in my county" the said sheriff by mistake dating his return March 3rd. instead of April 3rd. He says he would prove by said Robinson if present to testify, and the same is true, that about ten o'clock or shortly thereafter on the morning of the 30th. of January 1900 he met the defendant, Jas. B. Howard on the street in front of Kagin's restaurant at Lewis and Broadway in the city of Frankfort; that he walked with the said Howard to the office of the Board of Trade hotel and there was seated with the said Howard and a man by the name of F. M. Poer at the time of the shooting of Senator Goebel and which shooting took place fully two squares from the point at which the said witness and the defendant were at the time said shooting occurred; that while sitting in said office somebody came to the door of the same and opened it and announced that Senator Goebel had been shot. As soon as this announcement was made all of the parties in
47 the office of the said Board of Trade hotel got up and went out and said Robinson went down Broadway towards the Capitol square and about Kagin's corner met some parties carrying the body of Senator Goebel which they took up to Dr. Hume's office.

Defendant and affiant says that on the 28th. day of February, 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Clark county, the county of the residence of F. M. Poer, requiring him to attend here as a witness on behalf of the defendant in the above styled action on the second day of the present April term of this court; that he immediately placed the same in the hands of the sheriff of the said county of Clark, who on the 21st. day of March, 1903 returned said subpœna "Not found." He says that he would prove by said Poer if present to testify, and the same is true, that on the 30th. day of January, 1900 about twenty minutes or more before the shooting of Senator William Goebel the said Poer saw the defendant, James Howard and one H. C. Robinson come into the office of the Board of Trade hotel at the corner of Ann and Broadway streets in the city of Frankfort and take seats in said office; that they had been talking there fully twenty minutes when somebody came to the door and announced that Senator Goebel had been shot; that all of the parties in said office, and there were some ten or twelve others besides said Poer, said Robinson and the defendant immediately went out into
48 the street; that at the time the announcement that Senator Goebel had been shot was made some one said they were

fighting and all of the parties in the said office of the Board of Trade hotel rushed out into the street and stayed there until the body of Senator Goebel was carried by and up to the office of Dr. Hume. Said Poer then went back into the office of said hotel.

Defendant and affiant says that on the 28th day of February, 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Laurel county, the county of the residence of Ed. Parker, requiring him to attend here as a witness on behalf of the defendant in the above styled action on the second day of the present April term of this court; he immediately placed the same in the hands of the sheriff of said Laurel county, who on the 4th. day of April, 1903, returned said subpœna "Not found." He says that he would prove by said Parker if present to testify, and the same is true, that late on Sunday afternoon on the 28th day — January, 1900, just after he had gotten his mail at the office in London, Ky., he saw defendant, Jas. B. Howard, Beve White and Joe Wagers ride across the street in front of him and he recognized one of them as Mr. White the sheriff of Clay county; that he saw them the next morning in London but that he was not at the Catchings hotel on that Sunday afternoon or night that these gentlemen passed through London and that he was not at the Catchings hotel after
49 those gentlemen came to London; that neither Howard, Wagers nor himself beckoned to White on the stairway as he was going up in the Catchings hotel for White to come away from Weaver when White was talking to Weaver; that nothing of that kind ever occurred; that after he got his mail he went directly home and never came away from home until next morning at his usual time about eight o'clock; that the defendant, Howard at the times said Parker saw him on this occasion in London was clean shaven and wore no mustache.

Defendant and affiant says that on the 28th. day of February 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Fayette county, the county of the residence of S. S. Sheppard, requiring him to attend here as a witness on the behalf of the defendant in the above styled action on the second day of the present April term of this court; that he immediately placed the same in the hands of the sheriff of Fayette county, who, on the 24th. day of March, 1903, returned said subpœna "Not found." Thereupon the defendant had said subpœna sent to the sheriff of Kenton county, in which county defendant was informed said Sheppard then was, but on the 2nd. day of April, 1903, the said sheriff of Kenton county returned said subpœna "Not found." He says that he would prove by said witness if present to testify, and the same is true, that he, the said Sheppard, was in the
50 auditor's office in the executive building on the 30th. day of January, 1900 when Senator Goebel was shot; that he heard and counted four shots; that he immediately went to the west door of the executive building arriving in said door in less than a minute after the said shooting; that when he got into the hall going out of

the auditor's office he saw Henry E. Youtsey coming from the east door between the treasurer's door and the door leading into the reception room of the secretary of state's office in a dog trot; that he seemed to be making for the office of the secretary of state; that he was excited and had a pistol in his hand and made some remarks to the witness which he did not catch; that said Sheppard then went to the west door of the building and found only two men there whom he did not know; that while standing there Grant Roberts and George Barnes come out; that he could see Senator Goebel lying on the pavement, that he did not know the defendant, James Howard at that time but has since seen him and now knows him; that said James Howard was not at that door at that time nor was he in the hall at or about that time; that at the time of said shooting he, the said Sheppard, was in a large central room in the auditor's office and that Sam Smith, Grant Roberts and Sam Bennett and Mr. Dillups were at their desks; that he remained at the west entrance of the executive building until some parties picked Senator Goebel up and started out of the gate with him and they had gotten
51 through the gate with him before he went to the reception room; that Senator Goebel was carried out not more than three minutes after he was shot; that witness saw William Reynolds of Lexington, a brother of C. O. Reynolds, pass through the west entrance door of the executive building while he was there. One of the men at the door was tall and the other was short. They were just standing there and were unarmed.

Defendant and affiant states that on the 28th. day of February, 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Whitley county, of the residence of George R. Hemphill, requiring him to attend here as a witness on behalf of the defendant in the above styled action on the second day of the present April term of this court; that he immediately placed the same in the hands of the sheriff of Whitley county, who on the — day of March, 1903, returned said subpœna "Not found." He says that he would prove by said Hemphill if present to testify and the same is true, that he, the said Hemphill, was at the time of the shooting of Senator Goebel employed as a clerk in the office of the secretary of state and that at the time of the said shooting was in the reception room of the secretary of state, between the governor's office and the private office of the secretary of state; that he
52 heard the shots which killed Senator Goebel; that within a minute or two after the firing of said shots Henry E. Youtsey came running into said reception room nearly out of breath, looking very pale and much excited and with a pistol in his hands; that said Youtsey ran up to the said Hemphill and whispered to him that Senator Goebel had been shot; that at no time that day or any day did he ever see the defendant, James Howard in or about the executive building; that two or three days before the shooting, he saw Henry E. Youtsey on his knees before one of the windows facing the front yard of the capitol grounds with a rifle in his hands

with the window slightly raised pointing in the direction of the front gates and over the walkway leading from the front gates up to the capitol building.

Defendant and affiant states on the 28th. day of February, 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Jefferson county, the county of the residence of John Davis, Jr. requiring him to attend here as a witness on behalf of the defendant in the above styled action on the second day of the present April term of this court; that he immediately placed the same in the hands of the sheriff of Jefferson county who, on the 23rd. of March, 1903, returned the said subpœna "Not found." He says that he would prove by said John Davis Jr., if present, and the same
53 is true that on the 30th. day of January 1900 at the time Senator Goebel was shot, he the said Davis, was upstairs over Mrs. Dailey's house on Clinton and Lewis street- and had been there for three or four hours; that he heard the shots fired and went down stairs and over to his house on the southeast corner of Lewis and Clinton streets, went in and spoke to his mother and came back on the front porch immediately or in a minute or so; that Gaines' stable was in plain view and he saw Bowman Gaines on the front steps of his house; that he was within thirty or forty feet of the gate at the corner of the state house grounds near the intersection of Lewis and Clinton streets; that he saw a man get over the fence at that place; that he was a tall and slender and dressed in a light gray or checked suit of clothes he is not certain which; that this man was not the defendant; that Bowman Gaines was not in sight at this time nor was any boy there or near there at that time.

Defendant and affiant states that on the 28th. day of February, 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Laurel county, the county of the residence of James Russell and William Parsley, requiring each of them to attend here as a witness on behalf of the defendant in the above styled action on the second day of the present April term of this court; that he immediately placed the said subpœna in the
54 hands of the sheriff of Laurel county, who, on the 4th. day of April, 1903, returned the said subpœnas to each of the said witness "Not found." He says that he would prove by each of the said witnesses if present, and the same is true, that he is — traveling man and lives in London, Ky. That he was on the train from London to Winchester on the 29th. of January, 1900, together with the defendant, Beve White and Joe Wagers, of Clay county; that he, defendant at that time had no beard at all; but was entirely clean shaven.

Defendant and affiant states that on the 28th. day of February 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Clay county, the county of the residence of Dr. W. F. Phillips, requiring him to attend here as a witness on behalf of this defendant in the above styled action on the second

day of the present April term of this court; that he immediately placed the said subpœna in the hands of the sheriff of Clay county, who, on the second day of April, 1903, returned the same "Not found." He says that he would prove by said Phillips if present to testify that he is a practicing physician in Clay county; that he is acquainted with the reputation of James Stubblefield for truth and veracity in the neighborhood in which he lived from what
55 his neighbors and acquaintances say of him and that his reputation for truth and veracity is bad; that he is acquainted with the general reputation of John M. Collins for truth and veracity in the neighborhood in which he lives from what his neighbors and acquaintances say of him and that his reputation for truth and veracity is bad.

Defendant and affiant states that on the 28th. day of February, 1903, he caused a subpœna to be issued by the clerk of this court directed to the sheriff of Clay county, the county of the residence of Estill Boberts, requiring him to attend here as a witness on behalf of the defendant in the above styled action on the second day of the present April term of this court; that he immediately placed the said subpœna in the hands of the said sheriff of Clay county, who, on the 2d. day of April, 1903, returned the said subpœna "Not found." He says that if present to testify, the said Estill Roberts would state, the same is true, that on Sunday January 28th. 1903, he rode with James Howard, the defendant, Beve White and Joe Wagers from Manchester to London, Ky. That he rode with the defendant most of the way and at that time the defendant Howard had no beard at all but was clean shaven.

Defendant and affiant states that on the 28th. day of February, he caused to be issued by the clerk of this court, a subpœna, directed to the sheriff of Jefferson county, the county of the residence
56 of John Davis Sr., requiring him to attend here as a witness on behalf of this defendant on the second day of the present April term of this court; that he immediately placed the said subpœna in the hands of the said sheriff of Jefferson county, who, on the 23rd. day of March, 1903? returned the said subpœna duly executed but that the said witness is not now present.

He says that he would prove by said Davis, if present, and the same is true, that at the time of the shooting of said Senator Goebel he was in the reception room in the executive building distributing the morning's mail; that within a minute or two after the said shooting Henry E. Youtsey came running into said reception room, almost breathless greatly excited and pallid and with a pistol in his hand.

That he, the said Davis, was continually in and around all parts of the executive building and capitol ground on the 30th. day of January, 1900 and for days before that and that neither on that day nor any day before that did he ever see James B. Howard, the defendant about the executive building or in the capitol grounds.

Defendant and affiants says that on the 28th. day of February he caused to be issued by the clerk of this court a subpœna directed to the sheriff of Kenton county, the residence of George F. Miller, George Wolfe and Charles Wolfe, requiring them — each of
57 them to attend as a witness on behalf of this defendant on the second day of this present April term of this court; that he immediately placed said subpœna in the hands of the sheriff of said Kenton county, who, on the 30th. day of March returned the said subpœna as to each of the witnesses "Not found." Defendant says that if said witnesses were present they would each say and it is true that on the — day of November, 1900 some place in the city of Cincinnati, Ohio, in the presence of Charles and George Wolfe, James Stubblefield said in their presence, that the Goebels were paying his expenses and giving him $10.00 per week for swearing in these cases, meaning the cases against persons accused of being connected with the killing of Senator Goebel, defendant's case being one of such cases.

Defendant and affiant says that on the 28th. day of February 1903, he caused to be issued by the clerk of this court a subpœna directed to the sheriff of Clay county, the county of the residence of Harvey Jones, requiring him to attend as a witness on behalf of this defendant on the second day of the present April term of this court; that he immediately placed the said subpœna in the hands of the said sheriff of Clay county, who, on the 2d. day of April, 1903, returned the said subpœna "Not found." He says that he will prove by said Jones if present and the same is true, that in the town of Manchester on November 3d. 1900 James Stubblefield said
58 to him, the said witness, that Jim Howard was as innocent of the killing of Senator Goebel as a babe or a child unborn but that — was big money in it and that he, Stubblefield proposed to get $1000.00 out of it.

Defendant and affiant says that on the 28th. day of February 1903, he caused the clerk of this court to issue a subpœna for Mrs. Kate Asher directed to the sheriff of Madison county the county of her residence, commanding her to appear on the second day of this April term to testify for defendant in this case and on April 3rd. 1903, said subpœna was returned duly executed. Defendants states that said witness is sick, about to be confined and cannot be present at the term, if present she would state, and the same is true that at White Hall in Madison Co., Ky., at the house of John Asher in November, 1900, James Stubblefield said to her that James Howard was as innocent of the murder of Goebel as a babe or a child unborn and that he knew nothing against him in this matter at all and at the same time wrote Howard a letter:

Defendant and affiant says that the evidence of each and every one of the above armed witnesses is material in his defense in this case and that due diligence has been used to obtain the same and he files herewith as part thereof, the subpœnas referred to
59 herein except those that have not yet been returned; that none of said witnesses are absent with his consent or by his

procumement and that this application for a continuance is not made for the purpose of delay but that justice may be done. He says that the statement of said witness- and each of them as above detailed is important in his defense and that the just and proper effect of said testimony of said witnesses cannot in a reasonable degree be obtained without an oral examination in court and that he expects to be able to have said witnesses present at the next term of this court but that he has been unable and will be unable to procuer the attendance of said witnesses or any of them at this term of court.

JAS. B. HOWARD.

Subscribed and sworn to before me by Jas. B. Howard this April 8th. 1903.

W. C. MARSHALL,
Ex. for F. Co.

James Andrew Scott, J. A. Violett, Carlo Little and W. M. Smith say that they are the only counsel for the defendant Jas. B. Howard, in the above styled case; that they have read the above affidavit for a continuance herein and they believe and state that the just and proper effect of the testimony of said witnesses and each of them cannot in a reasonable degree be obtained without an oral examination in court of said witnesses and each of them.

60

JAS. ANDREW SCOTT.
W. M. SMITH.
C. A. LITTLE.
J. A. VIOLETT.

61 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant.

Came defendant, Jas. B. Howard, filed his affidavit and entered his motion for a continuance herein to the next term of this court to which motion the plaintiff objected and offered to file the affidavit of B. G. Williams as to the residence of the witness George Hemphill, whose statement was embraced in the defendant's affidavit for a continuance; the defendant objected to the filing of the affidavit of said Williams and the court being advised overruled said objection and permitted said affidavit to be filed, to which defendant excepted. Thereupon the plaintiff offered to admit said affidavit to be read as the depositions of all said witnesses contained in said affidavit subject to exception for relevancy and competency except as to H. C. Robinson as to whom the court ruled that the defendant had not shown proper diligence, and as to George Hemphill who

was not shown to be in the State of Kentucky or subject to the jurisdiction of the court, thereupon the court overruled the defendant's motion for a continuance, to which ruling, refusing the continuance and to the ruling of the court excluding the statement of H. C. Robinson and George Hemphill, the defendant objects and excepts. (For B. G. Williams' affidavit see this record page 11.)

62 It appearing that of the regular panel of twenty four jurors drawn at the last term of this court to do jury services at this the present term fifteen of said panel appeared and answered to their names and were tested and for cause excused and it further appearing that of the remainder of said panel some had died, some were excused on the certificate of physicians stating they were by reasons of sickness unable to attend court and others were excused for reasons shown satisfactory to the court, and on motion of attorneys for *for* defendant that these facts be made to appear of record, it is so ordered by the court.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Order.

The defendant, Jas. B. Howard, having been twice tried under this indictment in Franklin county, and the whole panel summoned and in attendance at this court having been exhausted, and only one juror found qualified, and the court being satisfied that it will be impracticable to obtain a jury free of bias in Franklin county. It is now ordered that A. G. Jeffres sheriff of Franklin county with sufficient deputies proceed to Woodford county and there summon a special venire of one hundred and fifty (150) qualified jurors, Woodford county being the county in which it appears to the court that there is the greatest probability of obtaining impartial jurors, and said jurors so summoned are to appear at the court house in Frankfort, Kentucky, at 2 o'clock on the 9th of April, 1903.

63 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Order.

Upon the court directing a special venire to be summoned in this case from Woodford county, the defendant moved the court to require said jurors to be drawn from the drum or wheel in said county as is required by law in the selection of jurors in said county and the court being advised, overruled said motion to which defendant excepts.

The following order was filed April 10th, 1903.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Order.

Commonwealth's attorney, Franklin, came into the court and — the presence of the accused and his counsel, stated that he had a matter he desired to bring to the attention of the court, away from the presence of the jury. Thereupon the court, counsel for the Commonwealth, the defendant in person, and his counsel retired to the county judge's office. Thereupon the attorney for the Commonwealth filed the affidavit of Ben F. Hackett, and for reasons therein shown, moved the court to discharge, juror, J. C. Alexander from service as a juror on the trial of this case, to which motion defendant by counsel objected and argument of counsel on both sides being heard upon the objection it was agreed by counsel on either side that the court might, in the absence of defendant and counsel, question the
64 said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to said Hackett while in the custody of the sheriff, "Hello Ben." I am glad they cut you off of this jury as I did not want to serve on this jury with you, and the said Alexander having admitted the truth of said statement but claimed the said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged; and the court being thus advised, overruled defendant's objection, and discharged and excused said Alexander and defendant by counsel excepts.

Thereupon the defendant moved the court to discharge the entire panel remaining, which was objected to by attorney for the Commonwealth, and the court being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel excepts.

The following affidavit was filed April 10th, 1903.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, *of*
vs.
JAMES B. HOWARD. } Affidavit of Ben Hackett.

This affiant Ben Hackett, says that after the killing of William Goebel, he and Mr. J. C. Alexander, who had been accepted on the jury to try said case, had many conversations and arguments about

the said killing, this affiant expressing and urging the
65 opinion that there had been a conspiracy to murder Goebel among those — were charged with this murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him these arguments and conversations — occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel, were frequent and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case and after the affiant had been excused—after those accepted as jurors had been charged and admonished by the court and immediately after the adjournment for supper and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were passing out through the court house yard when in passing Mr. Alexander said to this affiant, "Hello Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Affiant Ben Hackett says the foregoing statements are true.

BEN HACKETT.

Subscribed and sworn to before me by Ben Hackett, this April, 10, 1903.

JAS. H. POLSGROVE,
Co. Judge, Franklin Co.

The following bill of exceptions was filed April 10, 1903.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD.
} Bill of Exceptions.

66 Be it remembered:—

That on the trial of this case on the 10th. day of April, 1903, there had been tested and accepted by both Commonwealth and defendant herein, eleven jurors, J. C. Alexander being one of them and the twelfth juror had been called and qualified himself, as a competent juror.

Thereupon the Commonwealth's attorney together with the attorneys assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterwards returned into the court and filed the affidavit of Ben Hackett, which is as follows:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
JAS. B. HOWARD.
} Affidavit of Ben Hackett.

The affiant Ben Hackett, says that after the killing of Wm. Goebel he and Mr. J. C. Alexander who has been accepted on the jury to try this case had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him—these arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel—were frequent and much earnest interest and feeling was expressed by both this affiant and
67 Mr. Alexander therein.

This affiant further says that on yesterday afternoon late after Mr. Alexander had been accepted as a juror to try the case and after this affiant had been excused, after those accepted as jurors had been charged and admonished by the court, immediately after adjournment for supper and as the jury was being conducted by the sheriff away from the court house affiant by accident met the jury as they were passing out through the court house yard, when in passing Mr. Alexander said to this affiant, "Hello Ben, I am glad they cut you off of this jury as I did not want to serve on this jury with you."

Affiant, Ben Hackett, says the foregoing statements are true.

(Signed) BEN F. HACKETT.

Subscribed and sworn to before me by Ben Hackett this April 10, 1903.

JAS. H. POLSGROVE,
Co. Judge, Franklin Co.

And moved the court for reasons shown in said affidavit, to discharge said J. C. Alexander from service as a juror on the trial of this case, to which the defendant by counsel at the time objected and the court overruled said objection, and discharged said Alexander from service as a juror herein, to which defendant at that time excepted, and still excepts. That at the time said motion was entered, and said Alexander was so discharged the Commonwealth had exhausted of its peremptory challenges three and the de-
68 fendant had exhausted of his peremptory challenges twelve.

That on said motion to discharge said Alexander and before he was discharged by agreement with counsel upon either side, the court privately examined said Alexander as to the truth of the

charges as to what he said to said Hackett while he, Alexander was in the custody of the sheriff; and the court thereupon being advised discharged said Alexander as stated, to all said rulings of the court defendant at the time objected and excepted and objects and excepts and files this said bill of exceptions, duly signed and approved by the court.

JAMES E. CANTRILL, *Judge.*

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Motion.

Defendant, Jas. B. Howard files his affidavit and moves the court that Hon. R. B. Franklin Commonwealth's attorney be required to permit him or his attorneys to examine both the written statement called a confession in said affidavit, and also the evidence given before the grand jury which was reduced to writing and is alleged to be now in the possession of said Franklin or to furnish him at his expense a copy of each of said papers that he may be able
69 to prepare his defense, herein, to which motion the Commonwealth's attorney objected and filed his written statement herein, and the court being advised overruled the motion of the defendant to require the attorney for the Commonwealth to permit him or his attorneys to examine both the evidence and statement called a confession or the evidence given before the grand jury to which ruling of the court the defendant excepted at the time and still excepts.

The affidavits is as follows—:

Filed April 13, 1903.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Affidavit.

The defendant, Jas. B. Howard, states that at the last January term of this court one Henry E. Youtsey was called by the prosecution in this case before the Franklin County grand jury and was for about seven days interrogated as to his knowledge concerning the killing of William Goebel, and this defendant's connection therewith, as defendant is informed and states. He says that said Youtsey is the same person who is jointly indicted with this defendant and is the same person who was convicted in the Scott County

circuit court for the murder of said Goebel, and is now serving a life sentence for same in the penitentiary of the State of Kentucky at Frankfort; he says that he is informed that the testimony of said Youtsey was reduced to writing—is now in the possession of
70 the attorney for the Commonwealth Honorable Rob't B. Franklin; he also says that he is informed *that* he therefore charges that, while and inmate of said penitentiary and long before he was called before said grand jury to testify as aforesaid, Youtsey reduced to writing, signed and swore to a statement which he called a confession disclosing his information as to the facts and circumstances surrounding the murder of said Goebel and the names of all of the person- participating therein; that said statement or confession was delivered to Commonwealth's attorney, Rob't B. Franklin, who now *had* in possession of the same.

He says that he does not know, nor has he had an opportunity to know, the contents of either of said written statements and that ever since his surrender to the Commonwealth over two years ago he has been confined in jail and has not had the means or opportunity to learn what said Youtsey would state or has stated; and he makes this affidavit the basis for a motion to require said Commonwealth's attorney to permit him and his attorneys to examine said statement or to furnish copies of the same to this defendant at defendant's expense, in order that he may be able to properly prepare and obtain witnesses to present his defense and refute said statements of said Youtsey as may be untrue.

71 He says that on the 10th. day of this month he received, as he regards the first definite information of the fact that said Youtsey would be introduced as a witness against him in this prosecution and that said Youtsey would swear that this defendant was in some way connected with a conspiracy to kill William Goebel but in what way the defendant does not know.

He says that he had no knowledge or information or any means whatever of ascertaining what said Youtsey would state tending to connect this defendant with the commission of said crime, and therefore, he has been entirely unable to prepare his defense to meet any statement that he might make; but he says however that if said Youtsey does make any statement whatever connecting this defendant, either directly or indirectly, with the commission of said crime or connecting him in any way whatever with any conspiracy formed for the purpose of the commission of the said crime said statement will be absolutely and unconditionally false and untrue, as he says that he did not know or have any connection, with, or any wise participate in any conspiracy having for its object the assassination of said Goebel; nor did he fire the shot that resulted in his death; nor was he present at the time and place said shot was fired; nor did he have any knowledge or information whatever that said assassination would be attempted; and he says in order that he may be able in the event that said Youtsey attempts to connect

him with the said commission of said crime, to prepare his
72 defense and to show the falsity of said statements, he asks that, in the event that he is to be used as a witness herein, as against this defendant, the Commonwealth be required to deliver to this defendant or his attorney said confession aforesaid and his examination before the grand jury, or a copy of same in terms stated.

Affiant says that the Commonwealth's attorney has had the possession of each of said statements ever since they were made, and has prepared the case for prosecution therein, as he is informed, while the facts in said statement are kept from the defendant, and he has no means or possible way of ascertaining them.

He says that he makes this request with the best faith in order that he may have time to secure witnesses and to present his full defense herein; this in law, as well as in justice, under the peculiar facts of this case, he is entitled to the statements in the nature of a bill of particulars from the Commonwealth, in order that justice may be done.

JAS. B. HOWARD.

Subscribed and sworn to, before me by Jas. B. Howard this 13th day of April, 1903.

J. R. ELLIOTT, *Clerk.*

Franklin Circuit Court,

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.
} Statement of Attorney for Commonwealth.

73 Came the attorney for the Commonwealth and filed his written statement herein April 13th, 1903.

The attorney for the Commonwealth herein comes and says that he has not in his possession any "written confession of Henry E. Youtsey," nor has he any copies thereof, and in so far as he is informed and believes there is no such "written confession," or any copy thereof, as is referred to in defendant's affidavit this day filed, in existence.

Attorney for the Commonwealth says that he has in his possession the notes of the testimony of said Henry E. Youtsey given before the grand jury of Franklin county but declines to deliver same or any copy thereof, to defendant or his counsel unless ordered so, to do by the court and to the making of any such order attorney for the Commonwealth objects.

ROB'T B. FRANKLIN,
Commonwealth's Att'y, 14th Cir. Ct. Di.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant. } Motion.

Filed April 16th, 1903.

Comes the defendant, James B. Howard and files his affidavit herein and moves the court to set aside the swearing of the
74 jury in his cause herein and the case be continued until the next term of this court and he makes this motion in order that he may have a fair trial of his cause herein. To which motion the Commonwealth's attorney objected and the court being advised sustained the objection and overruled the motion to set the swearing of the jury and to continue the case to which ruling of the court the defendant excepted.

Franklin Circuit Court, April Term, —— 16th, 1903.

COMMONWEALTH OF KENTUCKY
vs.
JAMES B. HOWARD, Defendant. } Affidavit.

The defendant, James B. Howard, states that one Henry E. Youtsey the party referred to in his affidavit filed herein on April 13, 1903, was this day placed upon the stand as a witness in behalf of the Commonwealth that in his examination in chief he testified as shown, by a copy of the stenographer's report filed herewith marked H. E. Y. that as sworn by saidtestimony he makes statements — if true would show that Jas. B. Howard was connected with and participated in, the shooting of said Goebel and of which shooting he died.

Now defendant, Howard makes as part hereof said affidavit filed heretofore on April 13, 1903, asking that the Commonwealth's attorney be compelled to permit him to examine the statements or confessions made by said Youtsey, and also his statements before
75 the grand jury and he asks that said affidavit be read as part of this affidavit.

He says that it is not true that he either fired the shot that resulted in the death of said Goebel or that he was in any conspiracy to bring about said result or that he advised, aided or abetted in said acts. He says that it is not true that on the 30th. day of January 1900, he appeared in the executive's building and exhibited to said Youtsey a letter purporting to have been signed by said Taylor, or that he prior to said shooting received any letter from said W. S. Taylor or that he received a letter prior to said

shooting, relative to any conspiracy or the killing of said Goebel or that he had any connection or conversation with said Youtsey whatever on said day, and it is not true that he was, on said day at any time prior to or at the time of the shooting of the said Goebel, in said office of the secretary of state from which said Youtsey stated that the shot was fired that produced the death of said Goebel He says that he was not in said executive building at any time on said day until the afternoon. He says that by reason of said testimony of which for the first time he has received any definite knowledge or information as to what it would be, he has been surprised and is taken at a disadvantage in this, owing to the shortness of the term he cannot obtain testimony to refute the testimony of said Youtsey, which he could have successfully done, had he known what the testimony of said Youtsey would be. He says that the testimony of said Youtsey is false and untrue in all respects, so far as it attempts to connect this defendant in any way whatever
76 with the commission of said offense, and that if he is permitted until the next term of this court he can procure witness- and establish the fact that said statements are untrue which witnesses for the reason stated, he is unable to have at the present term of court and will — be able to procure them before its adjournment, but can have them here and establish the untruth of said statements.

Wherefore he asks the court to set aside the swearing of the jury and withdraw the same, and continue this case until the next term of this court in order that this defendant may fully prepare his defense herein. That this application for a continuance is not made for a delay but in order that he may have a fair trial.

Defendant Jas. B. Howard says that the statement- in the foregoing affidavit are true as he verily believes.

JAS. B. HOWARD.

Subscribed and sworn to before me by Jas. B. Howard this 16th. day of April 1903.

JAS. H. POLSGROVE,
P. J. C. F. C.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

Be it remembered; at the close of the cross examination of Henry E. Youtsey the defendant asked time to prepare questions
77 to lay foundation for purpose of contradicting Youtsey and the court granted until the following Tuesday morning for that purpose (see volume 4, page 827 of evidence).

And on April 21st. Tuesday morning Youtsey was called and re-

examined by the defendant, and defendant announced that he was through with his cross examination of witness, Youtsey. And on April the 26th. the defendant, Jas. B. Howard filed his affidavit setting up new facts discovered about which he desired to examine Youtsey and entered a motion based upon said affidavit to be allowed to recall said Youtsey to which the attorney for the Commonwealth objected and the court being advised sustained the objection and overruled the motion of the defendant to recall Henry E. Youtsey and to permit the defendant to examine him as to which ruling if the court the defendant at the time excepted and still excepts.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Affidavit.

The defendant, Jas. B. Howard says, that on yesterday his attorney learned for the first time, of the following statements and facts: that Mrs. Henry E. Youtsey will swear to, that both he and his attorneys have been using every effort possible to obtain all
78 information they could in regard to this matter but could not and did not learn of same earlier and he therefore asks that he be permitted to recall said H. E. Youtsey and to ask him in regard to said matters and lay the foundation for contradiction if same are denied, He says that he is informed and states that Mrs. H. E. Youtsey who is now in attendance upon this court as a witness for defendant will testify that in June 1902, in the prison office of Frankfort Ky., Henry E. Youtsey her husband wrote and handed her a slip of paper — the following, to-wit: "If I can make a statement on the stand I can get out of here."

Jas. B. Howard the defendant says that the foregoing statements are true as he believes.

JAS. B. HOWARD.

Sworn to before me this day 23, 1903, April.

J. R. ELLIOTT, *C. F. C. C.*

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Bill of Exceptions.

Be it remembered, that on the trial of this case on April 22nd 1903, defendant introduced as a witness and had sworn Green Golden and asked him where he was on January 30th. 1900, when the shot

was fired that killed Senator Goebel, Whereupon, said witness declined to answer said question or to give any evidence in the case, and then appealed to the court saying, "I am indicted for the
79 killing of Senator Goebel and the case is now on the docket undisposed of" (see page 1306 of evidence).

Thereupon the court asked the witness to state whether or not he claimed his privilege, and the witness answered in the affirmative, and the court thereupon ruled that he could not be compelled to testify, and refused to permit the defendant's attorneys to further interrogate said witness as to the said matters.

Whereupon the defendant by attorneys objected and excepted, and made the following avowal, to-wit:

That if allowed to interrogate said witness, and he was required to answer, he would state and say, that at the time the shot was fired that wounded said Goebel, of which wound he died, that the witness was in a building in an upstairs room with several other parties with a sick boy.

Said house in which the room was located is on the southeast corner of Lewis and Clinton streets, in Frankfort; and that said building is opposite the northeast corner of the fence around the capitol square; and that when said witness Golden and the other parties heard the shot, they immediately ran down stairs and out in the street, within a few feet of said corner of said square; and
80 then that a tall slender man, wearing a derby hat, coming down from towards the executive building, jumped over the fence on the pavement of the street, at or near said corner, and dropped his hat, and said witness got a good look at his face, and observed him closely, and knows that it was not Jas. B. Howard. And then another man, gray headed and about fifty years of age, jumped over said fence some distance west of said corner, and that he observed said party also, and knows that he was not the defendant, James Howard; and that at the times these men jumped over said fence as stated, neither Bowman Gaines or any one else, except the parties mentioned, were at or near said corner of the fence, or in the street at or near said corner, or between that and Gaines' stable.

That said witness will also state that on Monday, April 29th, 1900, he was in the Agricultural building, on the capitol square; that he saw Henry E. Youtsey with some men, unknown to said witness, in said building, and said Youtsey and the other men were holding up their hands in a position as if taking an oath; and then, after they had dropped their hands, Youtsey remarked to said parties "I intend to do it myself. I may have to stay in prison a while, but I will get out all right."

81 To said ruling of the court defendant at the time objected and excepted and still objects and excepts, and presents this as his bill of exceptions, duly approved and signed by the court.

"JAS. E. CANTRILL, *Judge.*"

For facts as to what transpired when Golden was offered as a witness see stenographer's report of evidence, volume 7, page 1306. And it will be remembered that before ruling, that said Golden could not be required to testify, the court examined the indictment against said Green Golden pending in Franklin circuit court, and the clerk will copy into this record said indictment against Green Golden. (For copy of the indictment against Green Golden see this record, page 34.)

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

Motion Entered April 27, 1903.

The defendant, Jas. B. Howard, moves the court to strike out from the testimony of Henry E. Youtsey all that part thereof, in regard to he (Youtsey) writing a letter on the 26th of January, 1900,
82 for Gov. W. S. Taylor to this defendant, and all of the evidence of said Youtsey relative to the contents of said letter. The defendant also moves the court to strike out the following answer of Frank Cecil, found in his testimony herein, page 481 of the stenographic report of his testimony, said answer being as follows: "He said (referring to Powers) we are looking for a man in the morning to kill Goebel, if he can't come, you know these mountain men that are down here and we want one. There was a man from across the hall wanted to kill him." He went across or pointed across towards the board in the corner and said there was a gun behind it and that man wanted to kill him, and he said "Why in the hell didn't you le. him do it," and he said, "We would not trust him." This is word for word what took place.

J. A. VIOLETT,
J. A. SCOTT,
CARLO LITTLE,
W. M. SMITH,
Att'ys for Def't.

To which motion the attorney for the Commonwealth objected and the court being advised sustained the objection and overruled the motion of the defendant to which ruling of the court the defendant by counsel at the time excepted and still excepts.
83 For agreed order, striking out evidence of Youtsey and Cecil, see record, page —.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

The defendant Jas. B. Howard moves the court to exclude the testimony of Chas. Day, heard herein, and especially that part wherein he says that Jas. B. Howard said, "When I look through a rifle I get meat," and all of said Day's evidence in reference thereto. The defendant also moves the court to exclude the evidence of D. A. Jones herein and especially that part in which he says in substance, that Howard said that whenever he looked through his rifle he got meat or blood, same being the statement that said Jones claims to have heard some time after the 15th of February, when he was walking behind Howard and two other gentlemen who were in conversation. And defendant moved to exclude all of said D. A. Jones' testimony in regard to same.

J. A. VIOLETT,
J. A. SCOTT,
CARLO LITTLE,
W. M. SMITH,
Att'ys for Def't.

84 To which motion attorney for the Commonwealth objected and the court being advised sustained the objection and overruled the motion of the defendant, to which ruling of the court the defendant by counsel at the time excepted and still excepts.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

Defendant moves the court to strike out all the testimony of the various witnesses heard herein, of statements made by parties other than defendant, and not in the presence or hearing of said defendant, Jas. B. Howard.

J. A. VIOLETT,
J. A. SCOTT,
CARLO LITTLE,
W. M. SMITH,
Att'ys for the Def't.

To which motion attorney for the Commonwealth objected, and the court being advised sustained the objection and overruled the motion of the defendant, to which ruling of the court the defendant by counsel at the time excepted and still excepts.

85 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

That on the calling of this case for trial the Commonwealth introduced in chief the following witnesses. (See stenographic report of evidence of official stenographer in volume 1, 2, 3 and 4.) The defendant then introduced the following witness in chief (see evidence of official stenographer in volumes 5, 6, 7, and 2 first pages of volume 8.)

This was all the evidence introduced in chief by the Commonwealth or defendant.

The Commonwealth then introduced in rebuttal the following testimony (see report of evidence of official stenographer in volume 8 of evidence). Thereupon the defendant introduced the following witnesses in sur-rebuttal. (See volume 8 of evidence.)

And this was all the testimony introduced by the Commonwealth and defendant in this cause.

Thereupon the attorney for the Commonwealth offered the following instructions numbered 1, 2, 3, 4, 5 and 6, which *was* objected to by the defendant, and the court overruled the objection, and gave each of said instructions, to which ruling of the court the defendant at the time objected and excepted, and still excepts.

The instructions given by the court are as follows:

86 Number 1.

If the jury believe from the evidence beyond a reasonable doubt, that the defendant did in Franklin county, and before the finding of the indictment herein, unlawfully, wilfully, feloniously and with malice aforethought, shoot and wound William Goebel with a gun or pistol loaded with powder and ball or other hard substances, with the intent to kill, and from which shooting and wounding the said Goebel soon thereafter died; or if the jury believe from the evidence beyond a reasonable doubt that the defendants, Henry Youtsey, Berry Howard, Harlan Whittaker and Richard Combs, or any one or more of them, did in this county and before the finding of the indictment herein, unlawfully, wilfully, feloniously and with malice aforethought, shoot and wound the said William Goebel with a gun or pistol loaded with powder and ball, or other hard substances, with the intent to kill him, and from which shooting and wounding the said Goebel soon thereafter died, and shall further believe from the evidence beyond a reasonable doubt that the defendant James Howard was then and there present acting with the said Henry Youtsey, Berry Howard, Harlan Whittaker and Richard Combs, or any one or more of them, and did then and there counsel,

encourage, advise, assist, aid or abet them, or any one or more of them, to shoot and wound the said Goebel, they ought to find the defendant guilty of murder, and fix his punishment at death or by confinement in the penitentiary for life, in their discretion.

87 No. 2.

The evidence of witness Wm. Saunderlin can only be considered by the jury as affecting the credibility of Beve. White, and not as substantive testimony against the defendant.

No. 3.

If the jury believe from the evidence beyond a reasonable doubt that a conspiracy was formed between the defendant and Henry Youtsey, Harlan Whittaker, Richard Combs, Berry Howard, or either of any of them, or with others or with another or others to the jury unknown, acting in concert with them, or either of them, to kill William Goebel, then after the formation of said conspiracy, if any, every act and declaration of each of the conspirators done or said in furtherance of the common design before the consummation thereof, became the act or declaration of all engaged in the conspiracy.

No. 4.

Every fact and circumstance necessary to constitute the guilt of the defendant ought to be proven to the satisfaction of the jury beyond a reasonable doubt, and unless the defendant has been so proven guilty beyond a reasonable doubt, the jury ought to find him not guilty.

88 No. 5.

The court instructs the jury that a criminal conspiracy is a corrupt combination of two or more persons by concerted action to do an unlawful act, or to do a lawful act by unlawful means.

No. 6.

The court instructs the jury that they cannot find defendant, Jas B. Howard, guilty herein, upon the testimony of any accomplice or accomplices unless such testimony is corroborated by other evidence tending to connect the defendant, Howard, with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and circumstances thereof.

Thereupon the defendant offered the following instructions on the behalf of the defendant, which *was* objected to by the attorney for the Commonwealth, and the court being advised, sustained the objection, and refused to give said instructions, to the ruling of the court in refusing to give said instructions and each of them the de-

fendant by counsel at the time objected and excepted, and still excepts.

The instructions refused are as follows:

89 No. 1.

The law presumes the innocence of defendant until his guilt has been proven to the satisfaction of the jury beyond a reasonable doubt, and it is the duty of the jury, if they can reasonably do so, to reconcile all the facts and circumstances proven in this case with that presumption, and that if upon the whole case, or any material fact necessary to establish the guilt of the defendant, they have a reasonable doubt of his being proven guilty, they should acquit him.

No. 2.

The court instructs the jury that (the defendant's guilt can only be established by his own acts), and although they may believe from the evidence that a conspiracy existed to kill Senator Goebel, and that in furtherance of said conspiracy he was killed, still they cannot find the defendant guilty herein, unless they believe from the evidence beyond a reasonable doubt that such a conspiracy was formed and that the said defendant, Jas. B. Howard, was a party thereto, and they cannot consider the acts or declarations of any other conspirators if such a conspiracy was formed unless they further believe from the evidence beyond a reasonable doubt that said defendant, Jas. B. Howard, was a party thereto.

90 No. 3.

The defendant cannot be convicted upon the testimony of an accomplice or accomplices, unless said testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense, and said corroboration is not sufficient if it merely proves the commission of the offense and the circumstances thereof.

No. 4.

Although the jury may believe from the evidence beyond a reasonable doubt that the defendant, Jas. B. Howard, was present at the time and place of the shooting of Senator Goebel and made no effort to prevent the same, yet, if they further believe from the evidence that he did not fire the shot which killed said Goebel, and did not aid or abet the person or persons who did said killing, they ought to find the defendant not guilty.

And these were all the instructions asked, given or refused.

91 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

Be it remembered, that during the argument of this cause for the Commonwealth by Hon. Thomas Campbell, one of the attorneys for the Commonwealth, the said attorney said to the jury in said argument, in commenting upon argument of defendant's counsel attacking Youtsey's evidence, he (Campbell) said, "Counsel for defendant is correct, Youtsey did not testify on either of the two former trials, and it was not necessary for him to testify on this trial."

To which statement of counsel the defendant, by counsel, objected, and moved the court to exclude said statement, and the court being advised overruled said motion and refused to exclude said statement, to which ruling of the court the defendant excepted and still excepts.

And in the closing argument in the trial of said cause the attorney for the Commonwealth, Hon. R. B. Franklin, said to the jury, "Yes, they sent him the letter, poor tool of the Whites,—Jim, that is what you have been all your life according to the evidence here." To which statement the defendant by counsel objected, and moved the court to exclude said statement from the jury, and the
92 court being advised, overruled the motion, and refused to exclude said statement, to which ruling of the court the defendant excepted at the time, and still excepts.

Franklin Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
JAMES HOWARD, Defendant.
Motion and Reason for a New Trial.

Defendant, James Howard, moves the court to set aside the verdict herein and grant him a new trial because he says his substantial rights have been prejudiced herein by reason of the following errors committed and proceeding had upon his trial, to-wit:

1st. Because the court erred in overruling the motion of defendant made herein to require that the one hundred and fifty jurors ordered to be summoned from the county of Woodford be drawn from the wheel or drum in said county as is required by law in the selection of jurors in said county when the regular panel is exhausted, to which ruling the defendant at the time excepted.

2nd. Because the court erred in discharging and excusing
93 J. C. Alexander for service herein as juror after he had been accepted, and also in overruling the motion then made by

defendant herein to discharge the entire panel so far as then accepted, to all of which defendant at the time excepted.

3rd. Because the court erred in overruling the defendant's motion made herein on April 15th, 1903, to set aside the swearing of the jury and continue the case to the next term of the court, to which the defendant at the time excepted.

4th. Because the court erred in overruling the defendant's motion to permit him to re-examine witness Henry E. Youtsey, who had been sworn and testified in this case as a witness for the Commonwealth.

5th. Because the court erred in overruling the motion to strike from testimony of various witnesses heard herein certain testimony and statement set out in said motion, to which defendant excepted.

6th. Because the court erred in overruling motion of defendant herein to strike from the testimony of Henry Youtsey, witness heard herein, certain testimony and statement fully set forth in said motion, to which the defendant excepted.

7th. Because the court erred in overruling motion of defendant to exclude and withdraw from the jury certain statement, testimony of witnesss-, Chas. Day and D. A. Jones, to which defendant excepted.

94 8th. Because the court erred in failing and refusing to give the jury instructions No. one, two, three, four and five offered by defendant herein, and in failing and refusing to give each and every one of said instructions, to all of which defendant at the time excepted.

9th. Because the court erred in giving to the jury, over defendant's objection and exceptions, instruction- No. one, two, three, four and five, and each and every one of said instructions, to all of which defendant at the time excepted.

10th. Because the court erred in permitting Hon. Thos. Campbell, one of the attorneys for the prosecution, to state to the jury in his argument that there had been previous trials in this case and in referring to the verdicts that were rendered on said trial, and upon objection being made by defendant's attorneys to said statement and argument, the court erred in failing to tell the jury to disregard the same, and in not withdrawing same from them, to all of which the defendant at the time excepted.

11th. Because the court erred in permitting Hon. Robert Franklin, the Commonwealth's attorney, to state to the jury in his concluding argument as follows: "Jim,"—meaning the defendant—"you have always been the tool of John G. White, and Bev. White, and

95 you are the tool of them now." To which defendant at the time excepted, and the court erred in failing to exclude said statement from the jury, and charging them to disregard said statement.

12th. Because the court erred in permitting the Commonwealth to introduce and have sworn Henry E. Youtsey as a witness herein, and in permitting him to testify herein, when his name was not at the

foot of the indictment and was not called when the witnesses were called and placed under the rule, and not put upon the stand until all of the witnesses for the Commonwealth in chief had testified except one.

13th. Because the court erred in overruling the motion of defendant to exclude certain statement- in the testimony of Frank Cecil, a witness herein, which statement- are fully set forth in the motion of defendant filed in this case, and to the overruling of which motion the defendant at the time excepted.

14th. Because the court erred in admitting the testimony of various witnesses sworn herein, which statement and testimony was objected to at the time by the defendant, and exceptions reserved, which is fully shown by a stenographic report of the evidence herein, and the court erred in excluding testimony and statement of certain witnesses offered herein by the defendant, and to which ruling of the court the defendant excepted, as is shown by said stenographic report of the testimony.

96 15th. Because the court erred in overruling the motion of defendant to require the Commonwealth's attorney to permit the defendant or his attorney to examine the written statement called the confession of Henry E. Youtsey, and the notes of the evidence given before the grand jury, or to furnish them a copy of same.

16th. Because the verdict herein is against the law and the evidence heard in the case.

17th. Because the court erred in failing to give to the jury the whole law of the case as applicable to the charge made and the evidence heard herein.

18th. Because the court erred in failing to instruct the jury as to the extent and the circumstances under which evidence all acts and declarations of co-conspirators were to be received against the accused or how far or under what circumstances the jury could consider such testimony of the acts and doings of co-conspirators as against the defendant.

19th. Because the court erred in ruling that the party Green Golden introduced as a witness in behalf of the defendant could not be compelled to testify in the case, and in refusing to permit the defendant's attorneys to interrogate said witness as to any matter relative to the case, and especially the facts set out in the bill of exceptions filed herein on April 23rd, 1903.

97 20th. Because the court erred in refusing to permit the defendant's attorneys to examine the witness Mrs. H. E. Youtsey, and in refusing to permit her to testify in the case, she being introduced and sworn in behalf of the defendant herein, to which the defendant at the time excepted.

21st. And finally the defendant moves the court to set aside the verdict herein and to grant him a new trial because he says he has not had a fair and impartial trial for the following additional reasons:

That the defendant was misled and prevented from procuring an impartial, unprejudicious and competent jury for the trial of his case by the answers and statements of Runyon Renshaw and Carter C. Neal, upon the examinations for qualifications as jurors:

R. T. RENSHAW, examined on the *voir dire* by Mr. Franklin, stated as follows:

Q. Have you formed or expressed an opinion as to the guilt or innocence of the accused, James Howard?
A. No, sir.
Q. Are you a house-keeper?
A. Yes, sir.
Q. Have you any conscientious scruples on the subject of capital punishment?
A. No, sir.
98 Q. Have you any desire that the verdict be one way in this case rather than another?
A. No sir.
Q. Do you know any reason why sworn as a juror you could not try this case and return a perfectly fair and impartial verdict?
A. No sir.

Questioned by Mr. EDWARDS:

Q. Have you attended either one of the trials of Mr. Howard?
A. No, sir.
Q. Have you read about it or heard about it?
A. I have read very little and have heard only a little talk.
Q. Have you had any discussion as to the merits of the case?
A. None that I recollect.
Q. You have neither had any opinion as to the guilt or innocence of Mr. Howard?
A. No, sir.
Q. Did you hear it discussed any?
A. Yes, sir; I heard it talked of.
Q. You formed no opinion whatever?
A. No, sir, I could not say I did.
Q. Have you any desire that the verdict in this case should be one way rather than another?
A. No, sir.
99 Q. Could you give a fair and impartial trial both to the Commonwealth and to the defendant?
A. I think so.
Q. Would you do that?
A. Yes, sir.

CARTER NEAL examined by Mr. Franklin on the *voir dire* stated as follows:

Q. Have you formed or expressed an opinion as to the guilt or innocence of the accused, James Howard, under this charge?
A. No, sir.
Q. Were you in Frankfort on the occasion of either of the former trials?
A. No, sir.
Q. Did you read about it in the newspapers?
A. I read some little.
Q. And you formed no opinion?
A. No, sir.
Q. Are you a house-keeper?
A. Yes, sir.
Q. What part of Woodford county do you live?
A. The western part.
Q. Have you any conscientious scruples on the subject of capital punishment?
100 A. No, sir.
Q. Do you know of any reason why, sworn as a juror, you could not try this case and return a perfectly fair and impartial verdict?
A. No, sir.
Q. Have you in your mind any prejudice or partiality for or against either side that would influence you at all as a juror?
A. No, sir.
Q. If sworn and accepted as a juror do you think you could hear the evidence and the law as here given and render a perfectly fair and impartial verdict?
A. I think so.

Question by Mr. EDWARDS:

Q. You have formed no opinion?
A. No, sir.
Q. Have none now?
A. No, sir.

when in fact the said Renshaw had prior to the time he was summoned as a juror herein, formed and expressed an opinion of the defendant's guilt, and further expressed his intention to render a verdict that the defendant should be hung, if he was accepted on a jury to try his case, and the juror Carter C. Neal had, prior to the time he was summoned as a juror herein, formed and ex-
101 pressed an opinion of the defendant's guilt, and had further expressed an intention, if on a jury to try defendant, to return a verdict that the defendant should be hung, which facts appear from the affidavits of W. L. Graddy, L. C. Wafford and H. F. Johnson, this day filed herewith, and which facts were unknown to defendant and could not, by the use of reasonable diligence, have

been known to defendant until after the rendition of the verdict herein.

JAMES HOWARD.

J. A. VIOLETT,
J. A. SCOTT,
W. M. SMITH,
Att'ys for Def't.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES B. HOWARD, Defendant.
} Affidavit.

This affiant, H. F. Johnson, states that he is a citizen and housekeeper, of Woodford county, Ky., and his occupation is that of a farmer, and he is now also engaged with a contract to carry the United States mail between Versailles and Cicero, in said county, and in addition, keeps a grocery in the village of Cicero; that he is acquainted, by sight and name, with Runyon Renshaw, of Versailles, one of the jurors on the trial of the above styled prose-
102 cution at the April term, 1903, of the above styled court; that a short time after the former trial of the defendant in this court, in which the defendant was sentenced to the penitentiary for life, the affiant was present on Main street in Versailles, Ky., when said Renshaw was engaged in a conversation with three or four companions, and affiant heard said Renshaw state, in that conversation, in substance, either "If I had been on the Howard jury, I would have hung him," or, "If I was on the jury to try Howard, I would hang him." Affiant is not now certain which of these statements was made by said Renshaw, but it was either one or the other. Said Renshaw and his companions were at that time engaged in discussing the guilt of Howard, and how he should be punished, and in that connection, the above statement was made by said Renshaw.

H. F. JOHNSON.

Subscribed and sworn to before me by H. F. Johnson, this 30th day of April, 1903.

F. TURNER,
Examiner, Woodford Co., Ky.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.
} Affidavit.

103 This affiant, L. C. Wafford, states that he is a citizen of Woodford county, Ky., and resides on the farm of Carter C.

Neal, near Railey Station; that he has known said Carter C. Neal, who is one of the jurors, who tried the above styled prosecution at the April term, 1903, of this court, for more than one year last past; that during the winter just past, this affiant had a conversation with said Neal, in which they were speaking of a trial in the Woodford circuit court, of a boy who was charged with murder, and during said conversation this affiant asked said Neal, "What would you do with Howard, if (meaning the defendant in this case) you were on his jury?" And the said Neal, in response to said question, answered, "I would hang him on the highest limb." Said conversation occurred in Woodford county, Ky., in the neighborhood where said Neal's farm was located, on the land of W. L. Garddy, while this affiant was engaged with said Neal in hulling clover for said Graddy.

The affiant further stated that the Howard referred to in the above mentioned conversation, was the Jas. B. Howard, who was charged with the murder of William Goebel, and the jury referred to, in affiant's said question, was a jury to be selected to try said Howard for that murder.

L. C. WAFFORD.

Subscribed and sworn to before me by L. C. Wafford, this 30th day of April, 1903.

R. H. GRAY,
Clerk of Woodford County Court,
By JOHN M. GRAY, *D. C.*

104 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Affidavit.

This affiant, W. L. Graddy, states that he is a citizen and a housekeeper of Woodford county, Ky.; that his occupation is that of a farmer; that he is well acquainted with Carter C. Neal, one of the jurors on the trial of this prosecution at the April term, 1903, of the above styled court; that in the month of September, 1902, on the farm of this affiant, near Woodford county, Ky., on which affiant resides, the said Carter C. Neal in a conversation with affiant relative to the murder of Wm. Goebel, and to those persons charged with its commission, and in said conversation, stated to affiant in substance that he believed the defendant, James B. Howard, was guilty of the crime of murder with which he was charged by indictment and that he (said Neal) if on the jury to try him, would return a verdict that defendant Howard —. Said Neal further stated in substance that he thought Henry E. Youtsey and other

persons charged with said crime were guilty and that said Youtsey should be punished by confinement in the penitentiary for life.

And about the last of October or during the month of No-
105 vember, 1902, or thereabouts, on a different farm of the affiant in Woodford county, known as the Gibson place, said Neal engaged in another conversation with the affiant as to the murder of said Goebel, and as to said Howard's connection with the same, in which Neal stated to affiant in substance that he believed the defendant Howard was guilty of Goebel's murder, and that if he was on the jury to try him, he would return a verdict that he (said Howard) should be hung.

W. L. GRADDY.

Subscribed and sworn to before me by W. L. Graddy, this 30th day of April, 1903.

F. TURNER,
Examiner, Woodford County, Kentucky.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant. } Affidavit.

Defendant, James Howard, states that he had no knowledge or information in regard to the statement in the matter set forth in the affidavit of W. L. Graddy, L. C. Wafford and H. F. Johnson, filed with his motion and grounds for a new trial herein, until after the
106 rendition of the verdict in this case, and could not have learned of same sooner by the exercise of reasonable diligence.

JAS. B. HOWARD.

Subscribed and sworn to before me by James Howard, this 2nd day of May, 1903.

WM. CROMWELL,
Notary Public, F. C., Ky.

Thereupon the attorney for the Commonwealth offered to file the affidavits of Carter C. Neal, J. L. Bohannon, E. P. Bunton, Arthur Sublett, to which the defendant, by counsel, objected, and the court overruled the objection, and permitted the affidavits to be filed, to which the defendant, by counsel, excepted, and still excepts.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES B. HOWARD, Defendant.
} Affidavit of Carter Neal.

This affiant, Carter Neal, states that he has read the affidavit of W. L. Graddy filed herein on this day in support of motion for new trial for above defendant; he says further that he denies that in the month of September, 1902, or at any
107 other time on the farm of affiant W. L. Graddy in Woodford county, Kentucky, on which W. L. Graddy resides, or at any other place, in conversation with W. L. Graddy relative to the murder of William Goebel, and those charged with its commission, that he said to W. L. Graddy either in words or substance that he believed the defendant, James B. Howard, was guilty of the crime of murder with which he was charged by indictment, and he denies that he at any time or place said to said Graddy, or to any other person, that if he were on the jury to try defendant, Howard, that he would return a verdict that defendant, Howard, should be hung; he denies that he said in words or substance at any time or any place to said W. L. Graddy that he, this affiant, thought Henry Youtsey and other persons charged with said crime were guilty and that said Youtsey should be punished by confinement in the penitentiary for life; this affiant, Carter C. Neal, further says that he denies that on or about the last of October or during the month of November, 1902, or at any other time, on a different farm of W. L. Graddy in Woodford county, known as the Gibson place, that he engaged in any conversation with affiant W. L. Graddy as to the murder of said Goebel, or as to Howard's connection with same; he denies that he, this affiant, either in form of words or substance, said to the affiant W. L. Graddy that he believed the defendant, Howard, was
108 guilty of Goebel's murder, or that if he was on the jury he would return a verdict that said Howard should be hung.

This affiant further says that above mentioned affiant W. L. Graddy is a strong sympathizer with those accused of complicity in the murder of William Goebel; that on the day the verdict in this case was rendered, as this affiant is reliably informed, said W. L. Graddy in the early morning was seen in the neighborhood of the home of this affiant, presumably for the purpose of procuring some sort of information or statement from somebody in the employ or connected with the family of this affiant, to be used for new trial purposes in the event of a verdict against said defendant Howard.

This affiant further says that two of the neighbors of this affiant informed him, that W. L. Graddy was intent in his feeling and opposition to a conviction of any one charged with the murder of William Goebel, and that said Graddy had said to them that he would spend

$50,000 before Howard should be convicted of the crime charged against him.

This affiant says that it is untrue that he ever said in form of words or substance anything to W. L. Graddy that directly or — indicated to said Graddy that he had any opinion as to the guilt or innocence of defendant James Howard.

Affiant Carter C. Neal further states that while he is acquainted with L. C. Wafford, whose affidavit was by defendant herein
109 this day filed, yet, he denies that during the winter just past, or at any other time, he ever had a conversation with said Wafford touching the guilt or innocence of any one charged with complicity in, or with the murder of William Goebel; he denies that said Wafford asked him, "What would you do with Howard (meaning the defendant in this case), if you were on the jury?" And he denies that this affiant, in response to said question, answered, "I would hang him on the highest limb." He says that said statement of said Wafford is absolutely and wholly untrue; that he never had a conversation with said Wafford in the neighborhood of where this affiant's farm is located or on the land of W. L. Graddy while this affiant was engaged with said Wafford in hulling clover for said Graddy, or at any other time, or at any other place, or under any circumstances, touching the guilt or innocence of any one in connection with the murder of William Goebel.

This affiant says that he has information which confirms him in the opinion that said L. C. Wafford was procured to make the affidavit filed herein by W. L. Graddy, whose affidavit is hereinbefore referred to and on file herein.

This affiant further says that until the hearing of the evidence on the trial of James Howard he had not sufficient information upon which to base a belief as to who was guilty of the murder of
110 William Goebel, and had not any prejudice or feeling against this defendant, and he says that he, in the making of his verdict, was influenced only by the evidence and the law as presented upon this trial.

CARTER C. NEAL.

Subscribed and sworn to before me by Carter C. Neal, this May 2nd, 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14th, 1906.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.
} Affidavit of A. G. Jeffers.

This affiant, Albert G. Jeffers, says that he is the sheriff of Franklin county, and summoned the jury ordered to be summoned from Woodford county by this hon. court; that after said jury was summoned in the town of Versailles in Woodford county, on Monday the 27th of April, 1903, W. L. Graddy, whose affidavit is filed on this motion for a new trial, reproached him because he had
111 not summoned said W. L. Graddy to serve as a juror in this case.

A. G. JEFFERS, *S. F. C.*

Subscribed and sworn to before me by A. G. Jeffers, this May 2nd 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14th, 1906.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant.
} Affidavit of Arthur Sublett, J. L. Bohannon, & E. P. Bunton.

These affiants, Arthur Sublett, J. L. Bohannon and E. P. Bunton, say that they are sheriff and deputy sheriffs of Woodford county, Kentucky; that Commonwealth's attorney Franklin applied to them to find Runyon Renshaw that he might be present in this court to file his affidavit touching the truth or falsity of the statements in the affidavit of H. F. Johnson filed herein on the motion for a new trial; that they made diligent search and failed to find said Renshaw in Woodford county, but learned that said Renshaw is
112 now in the city of Louisville, where he has been for the last few days; that it will be impossible to procure the attendance here of said Renshaw before the adjournment of this court; they say further that they are well acquainted with said Renshaw; that he is a man of high personal character and integrity, a very quiet man, rarely expressing an opinion upon any subject, even of great public interest.

ARTHUR SUBLETT.
J. L. BOHANNON.
E. P. BUNTON.

Subscribed and sworn to before me by Arthur Sublett, J. L. Bohannon and E. P. Bunton, this May 2nd, 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14, 1906.

Franklin Circuit Court.

COMMONWEATH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant.
} Affidavit of Jas. L. Bohannon.

This affiant, James L. Bohannon, says that he is slightly acquainted with H. F. Johnson, whose affidavit is filed herein
113 on defendant's motion for a new trial; that said Johnson is not a neighbor, friend or associate of Runyon Renshaw, but that said Johnson lives or loafs, when not carrying the United States mail, in the neighborhood of W. L. Graddy, whose affidavit is filed herein.

J. L. BOHANNON.

Subscribed and sworn to before me by Jas. L. Bohannon, this May 2, 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14th, 1906.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant.
} Affidavit of E. P. Bunton and J. L. Bohannon.

These affiants, E. P. Bunton and J. L. Bohannon, say that they are citizens and residents of Woodford county, State of Kentucky; that they are well acquainted with W. L. Graddy, whose affidavit is on file herein, and from their association, conversation with,
114 and knowledge of, said W. L. Graddy, knew him to be an intense sympathizer with those charged with the murder and with complicity in the murder of Wm. Goebel; they further say that it is the common talk in the town of Versailles that said Graddy has in the last few days, about the court-house and other public places in the town of Versailles, been declaring his belief in the absolute innocence of James Howard under this charge, and saying that he would spend $50,000 before he (Howard) should pay the penalties fixed in the verdict of this jury.

E. P. BUNTON.
J. L. BOHANNON.

Subscribed and sworn to before me by E. P. Bunton, J. L. Bohannon, this May 2nd, 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14th, 1906.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant.
} Affidavit of Commonwealth's Attorney Franklin and Judge B. G. Williams.

115 Affiants, R. B. Franklin, Commonwealth's attorney, and B. G. Williams of counsel for the Commonwealth, in the above entitled prosecutions, say that they were both present at the trial of this cause, during the progress thereof, and during all of the arguments; they say that counsel for the defendant expressly and unequivocally referred to and discussed the fact that *that* had been former trials of James Howard on this charge and that what was said by counsel for the Commonwealth with reference to former trials was in the nature of comment upon evidence introduced and in response or reference to what had been said by counsel for Howard; they say that whilst the Hon. Thomas Campbell, of counsel for the Commonwealth, referred to the fact that there had been previous trials of this cause, he did not in the discussion say what the former verdict had been.

They further say that they deny that the Commonwealth's attorney, R. B. Franklin, used the language imputed to him in the plaintiff's motion and grounds for a new trial, to-wit: "Jim (meaning the defendant), you have always been the tool of John G. White and Bev. White, and you are the tool of them now;" but they say that his language was actually as follows: "Yes, they sent him the letter. Poor tool of the Whites; Jim, that is what you have been all your life according to the evidence here."

ROB'T B. FRANKLIN.
B. G. WILLIAMS.

116 Subscribed and sworn to before me by R. B. Franklin and B. G. Williams, this May 2nd, 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14, 1906.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES HOWARD, Defendant. } Affidavit.

Defendant, James Howard, states that he through his attorneys completed his motion and reasons for a new trial herein late yesterday afternoon, and he is informed both by one of his attorneys and the Commonwealth's attorney that yesterday afternoon W. M. Smith, one of his attorneys, gave to the Commonwealth's attorney the names of Renshaw and Neal and the statements that was claimed they made before qualifying as jurors and told him the substance of said statement, and that he did not know, nor did his attorneys, what these counter-affidavits would contain, and had no intimation of what it would be, and did not know of it until a few minutes since, and that he believes if allowed a reasonable time he can show to the
117 satisfaction of the court that the statements contained in the original affidavits filed by defendant are true and to disprove the statements and insinuations in the counter-affidavits.

Therefore defendant prays the court in the event said counter-affidavits be permitted to be filed, he be given time to file affidavits or introduce witnesses to disprove the statements in the counter-affidavits.

JAS. B. HOWARD.

Sworn to before me by J. B. Howard, this May 2nd, 1903.

J. R. ELLIOTT, *C. F. C. C.*

And upon the filing of the affidavit the defendant by counsel moved the court to give the defendant time to file additional affidavits or introduce proof as stated in said affidavit, to which the Commonwealth objected, and the court sustained the objection, and refused to give the defendant time to either file affidavits or introduce proof, to which ruling of the court the defendant at the time objected and excepted, and still excepts.

118 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Affidavit.

Defendant, Jas. B. Howard, states that he has no money or property and is not able to pay for a transcript herein necessary to complete his appeal, or to prepare same, and that unless he be allowed said transcript by this hon. court without payment therefor, he will

be deprived of his rights allowed by law of appeal which he is now prosecuting or preparing to prosecute in the best of faith and intends to complete properly, provided he can procure as requested the necessary transcript of the record which he is informed will be something exceeding two thousand pages, and he asks that he be allowed the time necessary to file his bill of exceptions and evidence and to have the necessary transcript made out.

JAMES HOWARD.

Sworn to before me by J. B. Howard, this May 2nd, 1903.

J. R. ELLIOTT, *C. F. C. C.*

Thereupon the defendant moved the court to require that the transcript for an appeal herein be furnished him without pay, and filed his affidavit in support of said motion, which motion
119 being heard, was overruled by the court, to which the defendant excepted.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.

The court thereupon overruled the motion of the defendant to set aside the verdict and grant him a new trial, — which ruling of the court the defendant at the time excepted, and still excepts. The court thereupon rendered the following judgment and sentence of the defendant.

Franklin Circuit Court, May 2nd, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant. } Murder.

The defendant, Jas. B. Howard, was this day called into court, and being informed of the nature of the indictment, plea and verdict, was asked if he had any legal cause to show why judgment should not be pronounced against him; and none being shown, it is
120 adjudged by the court that the defendant be taken to the jail of Franklin county and thence from there by the sheriff of Franklin county to the penitentiary at Frankfort, Ky., and there confined at hard labor for and during his natural life.

To which judgment the defendant objected and excepted, and prayed an appeal to the court of appeals, which is granted, and it is

hereby ordered that the judgment herein be and the same is hereby suspended for a period of sixty days.

Thereupon came the defendant and produced and filed his bill of exceptions, and the same being presented to the court, was examined and approved and signed by the judge thereof, as the manner is, and was ordered made a part of the record of this case without being spread at large upon the order book thereof.

And the clerk of this court is directed to certify the stenographic report of the evidence filed in his office by the official stenographer as a true copy of the evidence of said trial, to the clerk of the court of appeals, as required by law, instead of being copied by said clerk.

JAS. E. CANTRILL, *Judge.*

121 Franklin Circuit Court.

STATE OF KENTUCKY, }
County of Franklin, } *sct:*

I, J. R. Elliott, clerk of the Franklin circuit court, do certify that the foregoing 111 pages, together with volumes 1, 2, 3, 4, 5, 6, 7 & 8 (1756 pages), official stenographer's report of evidence, contain a true and complete transcript of the case of Commonwealth of Kentucky *v.* James Howard, since the filing of the mandate of the court of appeals herein on January 31, 1903.

Witness my hand as clerk of said court, this 29th day of June, 1903.

J. R. ELLIOTT,
Clerk Franklin Circuit Court.

122 With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals, in words and figures as follows, to-wit:

Kentucky Court of Appeals.

JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

The judgment herein was rendered on May 2nd, 1903, and will be found on page- 41 and 119 of record herein.

W. M. SMITH,
J. A. SCOTT,
CARLO LITTLE,
J. A. VIOLETT,
Att'ys for Def't.

Filed Jun- 29, 1903.

S. J. SHACKELFORD, *C. C. A.*

Be it remembered that on the 21st day of September, 1903, in the court of appeals of Kentucky at the capitol at Frankfort, the following order was entered, to-wit:

123 "HOWARD v. COMMONWEALTH. } Franklin

Comes appellant by counsel, and on motion said case is ordered to be set for oral argument."

And afterwards on the 30th day of September, 1903, at a court of appeals at the capitol in Frankfort, the following order was entered, to-wit:

"HOWARD v. COMMONWEALTH. } Franklin.

Ordered that this case be set for oral argument on November 24th, 1903."

And afterwards on the 24th day of November, 1903, at a court of appeals held at the capitol at Frankfort, the following order was entered:

"JAMES B. HOWARD v. COMMONWEALTH. } Franklin.

Came the parties by counsel and filed an agreement, and on motion and by consent, it is ordered that appellant may have until Dec. 4th, 1903, and appellee may have until December 14th, 1903, to file briefs herein, and it is further ordered that the case be continued on the argument docket and set for argument on the 3rd day of the next January term."

(The agreement mentioned and referred to in said order is not copied, not being with the files.)

124 And afterwards on the 6th day of January, 1904, at a court of appeals at the capitol at Frankfort, the following order was entered to-wit:

"HOWARD v. COMMONWEALTH. } Franklin.

This case coming on to be heard, was argued by B. G. Williams for the appellee and laid over for further argument until to-morrow."

And afterwards on the 7th day of January, 1904, at a court of appeals held at the capitol at Frankfort, the following order was entered to-wit:

"HOWARD
v.
COMMONWEALTH. } Franklin.

This case coming on for further argument was argued by W. M. Smith for appellant and submitted."

And afterwards on the 22nd day of April, 1904, at a court of appeals at the capitol at Frankfort, the following judgment was entered, to-wit:

'JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH, Appellee. } Appeal from Franklin Circuit Court.

The court being sufficiently advised, it seems to them there
125 is no error in the judgment herein.

It is therefore considered that said judgment be affirmed which is ordered certified to said court.

(Whole court sitting. Chief Justice Burnam and Judge O'Rear, dissenting. Dissenting opinion delivered by Judge O'Rear.)"

And on said date the court delivered the following opinion:

Court of Appeals of Kentucky, April 22nd, 1904.

(To be reported.)

JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH, Appellee. } Appeal from Franklin Circuit Court.

Opinion of the Court by Judge Settle.

The appellant, James B. Howard, was tried and convicted
126 the third time in the Franklin circuit court under an indictment returned in that court against him and others charging them with the murder of William Goebel, and his punishment fixed by the verdict of the jury and sentence of the court at imprisonment in the penitentiary for life.

His motion for a new trial was overruled by the lower court, and by this appeal he seeks a reversal of the judgment of conviction.

There have been two former appeals herein. See Howard *v.* Commonwealth, 22 L. R., 1845; Same *v.* Same, 24 L. R., 1225.

As the principal facts connected with the crime for which appellant was convicted were stated and commented on in the opinions of this court on the former appeals, we deem it unnecessary to enter upon a recital of them in this opinion. Suffice it to say that the evidence shows that Hon. William Goebel, on January 30th, 1900, in Frankfort, and on the capitol square, while approaching the main entrance of the state house, was shot and wounded by some one in concealment, of which wound he in a short time thereafter died. It has been and is the theory of counsel for the Commonwealth that the bullet which deprived him of his life was fired by the appellant, though others are charged and jointly indicted with him as aiders and abettors in the crime.

127 There were 21 grounds for a new trial filed by appellant in the lower court, several of which were relied on by him on the former appeals, and were then held by this court insufficient to authorize a reversal. It will, therefore, be unnecessary for us to again consider such of them as were then determined. Indeed, we feel called upon to discuss and pass upon only such of the grounds for reversal as were urged by counsel for appellant in argument before us, and will consider them in the order in which they were presented.

First. It is contended that the court erred in the formation of the jury in that by its order for the summoning of 150 jurors from the county of Woodford, it was not required that they be drawn from the jury wheel or drum of that county, but only that they be summoned from the county at large by the sheriffs of Franklin county. In Curtis *v.* Commonwealth, 23 L. R., 267, it was held that the manner of selecting the jury in that case was error, but as section 281 of the Criminal Code of Practice provides that,

"The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motion for a new trial, shall not be subject to exception,"

this court is without power to revise such an error. In several cases subsequently decided, the most recent being that of Turner *v.* Commonwealth, the opinion in which is yet unpublished, the rule announced in Curtis *v.* Commonwealth, *supra*, was adhered to and approved. We find it unnecessary, therefore, to decide whether or not there was error in the manner of summoning the jury, or in its formation, as a reversal by this court upon that ground, even if such error had been committed, would be unauthorized.

128

Another alleged error complained of by appellant was the discharge by the trial court of the juror J. C. Alexander.

It appears that he and ten others had been accepted by the parties as jurors, and that but one other was to be selected in order to complete the panel of twelve. The Commonwealth had then exhausted three of its peremptory challenges, and the appellant twelve of his, though neither party had been required to, or had, exercised

the right of peremptory challenge, except as there were twelve men in the jury box, who had upon the *voir dire* been found qualified. At this point it was suggested to the court by the Commonwealth's attorney, out of the hearing of the jury, that had thus been partly made up, that he had just received information to the
129 effect that J. C. Alexander had theretofore formed and expressed an opinion as to the merits of this case, and with respect to the crime charged in the indictment, and had after he was accepted on the jury improperly conversed with a person, not a member of the jury, on a subject connected with the case, notwithstanding the previous admonition of the court not to do so. This communication of the Commonwealth's attorney was immediately followed by a motion from him to discharge Alexander from the jury, in support of which was filed the affidavit of Ben Hackett, who had himself been excused as a juror in the case.

It was stated in the affidavit, in substance, that the affiant and Alexander after the death of William Goebel, had many conversations and arguments about the killing, in which affiant contended that there had been a conspiracy to murder Goebel among those who were charged with his murder, and Alexander expressed and urged the opinion that there had not been such a conspiracy. That in these conversations both affiant and Alexander manifested much earnest interest and feeling. And further that after Alexander and some other members of the jury had been accepted, put in charge of the sheriff and admonished by the court, he said to the affiant, after adjournment on the day before the filing of the affidavit and
130 as the jury were passing out through the court house yard, "Hello, Ben, I am glad they cut you off of this jury as I did not want to serve on this jury with you."

Before passing upon the motion of the Commonwealth's attorney, the court privately examined Alexander, while the latter was in the custody of the sheriff, touching the truth of the charges contained in the affidavit of Hackett, and as the result of such examination discharged him from the jury.

It was stated by counsel for the Commonwealth in the oral argument and by brief in this court, and not denied in the oral argument or brief of counsel for appellant, that the examination of Alexander was conducted privately by the court at the request of counsel for appellant, made in the latter's presence and with his consent. Be that as it may, in ascertaining what transpired in the lower court in this case, we must look to and be governed by the record made therein, and it appears from the record that the privy examination of Alexander was made by consent of the parties, though it further appears that appellant at the time of the discharge of Alexander excepted to such discharge and moved the court to also discharge the ten persons remaining of the jury, which the court refused to do, but proceeded to complete the jury, subject to the right of challenge by either party to the extent of the
131 challenges remaining to them, by selecting from the persons

summoned from Woodford county for that purpose the two necessary to complete the panel of twelve.

As what occurred in the privy examination of Alexander does not appear in the bill of exceptions, we are unable to know whether he admitted or denied the statements made in the affidavit of Hackett, except that it does appear in the bill of exceptions that he made the admission—presumably before the privy examination—that he said to Hackett after the latter had been excused from the jury, and he had been accepted as a member thereof, "Hello, Ben, I am glad that they cut you off of this jury, as I did not want to serve on this jury with you," but claimed that it was made in a jocular way.

It is insisted for the Commonwealth that Alexander's admission as to the above statement warrants the conclusion that what was said in the affidavit of Hackett, as to arguments between Alexander and himself involving the merits of this case, is true, otherwise what reason did Alexander have for not wishing to serve with Hackett on the jury?

In this view of the matter it is argued that the action of the lower court, in discharging Alexander from the jury, was not an abuse of discretion.

132 Upon the other hand, it is insisted for appellant, that it was error for the court to examine Alexander in his absence, and that he could not legally waive his right to be present at such examination. In support of this contention, section 183 Criminal Code is relied on, which provides:

"If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial * * *."

While this court in construing the section, *supra*, has repeatedly held that one charged with the commission of a felony cannot be tried during his absence from the court room, we find that cases have arisen in which it has been deemed necessary to relax that rule. Thus in Hite *v.* Commonwealth, 14 L. R., 308, it was held that the occasional absence from the court room of the accused, on account of temporary illness for a few minutes at a time, the trial continuing in his absence, did not prejudice the substantial rights of the accused. In Meece *v.* Commonwealth, 78 Ky., 586, it appeared that after the submission of the case to the jury and their retirement to the jury room, they returned into court and asked for further instructions. The court declined to give any, but in the presence of counsel for the prisoner inserted by interlineation certain words in one of the instructions. The accused was absent at the time,

133 and it was urged in his behalf that for this reason the judgment should have been reversed. This court, however, held otherwise, in doing which it said:

"While we recognize the fact that the accused when on trial for a criminal offense should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence either before or after the submission of the cause to the jury, still this court is only authorized to reverse in cases where

the substantial rights of the accused have been prejudiced in the court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist, except by the legislation of the State on the subject, and when permitting an appeal the law making power has the right to determine for what cause a reversal may be had. * * *."

It has also been held by this court that a trial for felony begins when the jury is sworn. Willis *v.* Commonwealth, 86 Ky., 68. At the time the examination of Alexander took place and when he was discharged, the jury had not only not been sworn, but it had not been completed.

134 There are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive. Such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jurors to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury.

It is, however, beyond our province to reverse this case for error, if there were any, in excluding Alexander from the jury. Our right to do so is expressly forbidden by section 281 of the Criminal Code, and we have already referred to Curtis *v.* Common-

135 wealth, 23 L. R., 267, and Turner *v.* Commonwealth, (yet unpublished), to indicate this court's construction of that section. In addition to those cases, a further recent authoritative utterance of this court to the same effect will be found in Alderson *v.* Commonwealth, 25 L. R., 32, in which one of the grounds for reversal, as set forth in the record, was that the appellant over his objection at the time, was forced by the trial court to accept as jurymen persons alleged to have formed an opinion as to his guilt or innocence.

Another alleged error was that after the Commonwealth had accepted in open court the full panel of twelve jurymen, and after they had been passed to the appellant for acceptance or peremptory challenge, and he and his counsel had retired from the court house to pass upon the panel, the court over appellant's objection permitted

the Commonwealth to object to and excuse one of the jurymen without cause, though the whole twelve had been accepted by it. Whereupon appellant, as was done in the case at bar, moved the court to dismiss the entire jury, which motion was overruled.

In passing on the questions thus presented, this court, after quoting section 281 of the Criminal Code, *supra*, said:

"In construing this section we have uniformly held that
136 errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal."

Whatever may be the rule in other States, this question has been settled in Kentucky as herein indicated, and the authorities cited are the latest that have emanated from this court.

Another complaint of the appellant is the refusal of the lower court to require the Commonwealth's attorney to permit him to examine an alleged original statement called the confession of H. E. Youtsey, and the notes of the evidence given by him before the grand jury.

The motion of appellant for those papers was based upon his affidavit. A response to the motion was filed by the Commonwealth's attorney in which it was denied that he had, or knew anything of the alleged confession, but that he did have notes of Youtsey's testimony before the grand jury, which he refused to surrender.

The court ruled correctly in refusing to require the surrender by the Commonwealth's attorney of the notes of Youtsey's testimony given before the grand jury, as was decided by this court in Franklin *v.* Commonwealth, 20 L. R., 1137. In the opinion of which it is said:

137 "It appears from the record that the grand jury reduced to writing the testimony of the witnesses before it and furnished to the Commonwealth's attorney the evidence so taken. * * * It was the duty of the foreman of the grand jury, also under the statute, to communicate to the attorney for the Commonwealth when requested, the substance of the testimony before them. But we do not think the court below should in the exercise of sound discretion have required the Commonwealth's attorney to communicate to the defendant the evidence so reported to him by the foreman of the grand jury."

Appellant also complains that the court refused to compel Green Golden to give certain testimony demanded of him. It appears from the record that Golden was jointly indicted with appellant and others for the murder of William Goebel, and that the prosecution therefor is still pending against them. Golden was introduced by appellant, and after certain preliminary questions, without objection from the Commonwealth, or suggestion from the court, he announced that he had been indicted in this case, but had not been tried, and claimed his privilege, and he was not required to testify, upon the ground that he could not do so without giving evidence against himself.

138 In Roberson's Criminal Law, volume 2, section 980, it is said:

"It is a rule that no person is bound to answer any question, if the answer thereto would in the opinion of the trial judge, have a tendency to subject the witness, or the wife or husband of the witness, to any punishment, penalty or forfeiture. And the witness may claim the protection at any stage of the inquiry, whether he has already answered the question in part or not at all. If the fact to which he is interrogated forms but one link in the chain of evidence which is to connect him, he is still protected. The privilege is one personal to the witness and to be exercised by him alone, and counsel will not be allowed to make the objection. Nor can the witness be made to explain how he might be criminated by the answer, as this would strip him of the privilege which the law allows him. But it is not enough for the witness to say that the answer will criminate him. He is not the sole judge of the fact. It is for the court to determine from all the circumstances whether there is really reasonable ground to apprehend danger to him from his being compelled to answer." Burdett *v.* Commonwealth, 93 Ky., 79; 1st Greenleaf, section 451.

139 Chief Justice Marshall in the trial of Aaron Burr, said:

"If the question be of such description that an answer to it may or may not incriminate a witness, according to the purport of the answer, it must rest with himself, who alone can tell what it would be to answer the question or not." Burr's Trial, 224.

From these authorities, the statements of Golden, and his reasons for not testifying, it was manifest that he is entitled to avail himself of the privilege allowed by law, and the court properly excused him from testifying.

It is insisted for appellant that it was error for the trial court to refuse him permission to recall and further cross-examine H. E. Youtsey. It will be found that the direct examination of Youtsey comprises ten pages of volume three of the bill of evidence, and the first cross-examination one hundred and eighty pages of that volume. On the first cross-examination he appears to have been on the stand about two days, at the end of which, viz: April 17th, the cross-examination was suspended, and appellant given until April 20th to prepare for his further cross-examination. On April 21st he was again cross-examined at great length, and finally dismissed. On April 23rd appellant asked to be allowed to recall and still further cross-examine Youtsey, for the purpose of laying the foundation to contradict him by his wife.

140 As will be presently shown, the expected contradiction would, if permitted, have been incompetent, but aside from this consideration after such a long and exhaustive cross-examination as was given the witness, covering, as it would seem, every possible aspect of the case and the witness' relation thereto, we are unwilling to say that it was an abuse of discretion for the court

under the circumstances to refuse to permit him to be recalled for the third time for still further cross-examination.

We are of opinion that the court properly excluded the testimony of Mrs. Youtsey, wife of H. E. Youtsey. Section 606 Civil Code of Practice provides:

"Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage, &c. * * *."

In Commonwealth *v.* Sapp, 90 Ky., 585, it was said by this court:

"If the proposed testimony violates married confidence in the slightest degree, or tends however slightly to impair the rule for its protection, the highest considerations forbid its introduction."

141 It will be found that the authorities are uniform in holding that this rule applies, whether such proposed testimony is sought to be introduced in a case where the husband or wife is party, or only others are concerned.

In Scott *v.* Commonwealth, 94 Ky., 511, in an able discussion of this doctrine by Judge Lewis, it was held that a letter to the wife from the husband in relation to a crime with which he was charged, could not be used in evidence by the Commonwealth, and the case was reversed because of its introduction as evidence therein. Applying that rule in this case, the note or letter proposed to be identified by Mrs. Youtsey, as well as any other testimony that she might have given in regard thereto, was clearly incompetent, because the same came to her from her husband by reason of the privacy and confidence of the marital relation, and the use of it to contradict him, would have been as fully within the reason, and as much against the policy of the law, as would any other confidential disclosure that he may have made to her. And the same rule that forbade her testifying in this case, would have excluded as incompetent, any statement from him made to her on the same subject.

Objection is made that the trial court refused to exclude certain testimony of H. E. Youtsey and Frank Cecil, and also the
142 testimony of Jones and Day. We find that such of the testimony of Youtsey as appears to be incompetent was rejected and stricken out by the court. We think all the testimony of the four witnesses named, as it is shown by the bill of evidence to have been admitted by the court, was competent. It related to acts and declarations of the appellant, conducing to establish his guilt, as well as a conspiracy to take the life of William Goebel, in which he was an alleged participant and the principal. The testimony in question is of the nature, and similar in character, to much of the evidence held by this court on the former appeals in this case, and in the several appeals of Caleb Powers, to be competent.

It is to be borne in mind that the principal witnesses against

appellant, and the only ones who claimed to have personal knowledge of his guilt, were his accomplices, whose testimony it was necessary to corroborate as required by section 241, Criminal Code. In the very nature of the case, much of the corroborating testimony was necessarily circumstantial, and where, as in a case like this, such testimony must be relied upon, the evidence should be allowed to take as wide a range as would consist with justice, and the well recognized rules obtaining with reference to the admission of such evidence. We are of opinion, therefore, that while some of the evidence complained of, notably that of Jones and Day, is
143 somewhat remote and even fragmentary, yet inasmuch as practically the same statements, which they claim to have overheard as coming from appellant, were testified to by the witness Stubblefield as having been made to him by appellant in a conversation about the same time in regard to the death of William Goebel, in which conversation, as stated by Stubblefield, appellant admitted that he had fired the shot which killed Goebel, we think the lower court did not err in permitting the testimony of Jones and Day to go to the jury.

Appellant also complains of the instructions. But we find that the instructions conform absolutely to the rule laid down by this court on the second appeal, and are, besides, free from error.

A careful examination of the record having failed to disclose any error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

Whole court sitting.
Chief Justice Burnam and Judge O'Rear dissent.

144 And on said date Judge O'Rear delivered the following dissenting opinion:

Court of Appeals of Kentucky, April 22nd, 1904.

JAMES B. HOWARD, Appellant, vs. COMMONWEALTH, Appellee. } Appeal from Franklin Circuit Court.

Dissenting Opinion by Judge O'Rear.

I am unable to agree with the four members of the court who hold that the presence of the accused in a felony trial can be dispensed with, even by his consent, during the empannelling of the jury, or at any other stage of the trial. (Bill of Rights Constitution, sec. 11; Criminal Code, sec. 183; Meece *v.* Commonwealth, 78 Ky., 586; Rutherford *v.* Commonwealth, 78 Ky., 642; Temple *v.* Commonwealth, 14 Bush, 769; Allen *v.* Commonwealth, 86 Ky., 642; Hopt *v.* People of Utah, 110 U. S. 574.)

145 Nor can I agree that the evidence by Jones and Day of fragmentary conversations alleged to have occurred in Laurel county, between appellant and some other person, when it is conceded that the portions detailed are incomplete and disconnected from what went before or followed, is relevant as admissions by the accused. (Berry *v.* Commonwealth, 10 Bush, 16; Terrell *v.* Commonwealth, 13 Bush, 246.)

I concur with the majority of the court that the rejection of the communication between Youtsey and his wife was proper.

And afterwards on the 26th day of April, 1904, at a court of appeals held at the capitol at Frankfort, the following order was entered:

"HOWARD
v.
COMMONWEALTH. } Franklin.

Comes appellant by counsel and on his motion is given thirty days' time to file a petition for rehearing."

And afterwards on the 6th day of May, 1904, at a court of appeals held at the capitol at Frankfort, the following order was entered:

146 HOWARD
vs.
COMMONWEALTH. } Franklin.

Comes appellant by counsel and on his motion the time for filing a petition for re-hearing is extended until June 10th, 1904.

And afterwards on the 7th. day of June, 1904 at a court of appeals held at the capitol at Frankfort the following order was entered.

HOWARD
vs.
COMMONWEALTH. } Franklin.

Comes appellant by counsel and files a petition and moves the court to grant a re-hearing herein which motion and petition is submitted.

The motion named in said order is in words and figures as follows:

Court of Appeals of Kentucky.

JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.
} Motion for Re-hearing.

147 Comes the appellant James B. Howard, and moves the court to set aside the judgment of affirmance herein and to withdraw its opinion rendered on April 22, 1904, and grant him a re-hearing herein, for the following reasons:

1. He says that said decision is in conflict with the Constitution of the United States, and also the State of Kentucky, as well as the statutes of said State applicable in said case.

2. That said decision is in conflict and in derogation of the common law operative in this State.

3. He says that same is in violation of his rights under the Constitution of the United States, and especially under the fourteenth amendment thereof, because the ruling therein deprives him of his liberty without due process of law and denies to him the equal protection of the laws.

4. He says that same is in violation of his rights as guaranteed him under the fifth amendment of the Constitution of the United States, because it deprives him of his liberty without due process of law.

5. He says that same is in violation of the Constitution of the United States and in derogation of the common law, and more expecially the sixth amendment of said Constitution, because
148 in the examination of said juror, J. C. Alexander, same was had by the court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant.

6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

SEC. 281. What not subject to exception. The decisions of the court upon challenges to the panel (*a*) and for cause (*b*) upon motions to set aside an indictment (*c*) and upon motions for a new trial (*d*), shall not be subject to exception."

is in conflict with the rights of the defendant under the Constitution of the United States as well as the constitution of Kentucky and the common law obtaining in this State, and more especially in violation of sections five, six and fourteen of said Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in case of felony.

7. He says that the construction given by the court in said opinion, of section 281, is erroneous and prejudicial to his rights, in

this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

149 8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence of the defendant, and not to challenges made or heard either in the absence of said defendant or after the juror had been selected and accepted by both the Commonwealth and defendant, but he says that in the event, said section is construed by this court to apply to said state of case, then, that same is in conflict with the Constitution of the United States and the common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

9. He says that as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case, that the court may have a discretionary power over said juror before he is sworn, but there is a limitation upon said discretion, and that he cannot discharge him over the objection of the defendant simply because he has committed a contempt of court, as the court has the power to fine him or other wise punish him for same, but not to deprive the defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark.

150 He says that all of said rulings complained of, were and are prejudicial to his rights herein, and he herewith files in support of this motion, a petition for a re-hearing in this case, and he prays that same may be granted and that said opinion may be set aside or modified, and he asks for all other necessary and proper relief, the premises being considered.

WM. SMITH,
Att'y for Defendant.

151 The petition for re-hearing named in above order is in words and figures as follows:

Court of Appeals of Kentucky.

JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } Petition for Re-hearing.

Your petitioner, James B. Howard, by his attorneys, respectfully asks this court to set aside or modify the judgment of affirmance herein, and to withdraw its opinion rendered on April 22, 1904, and grant him a re-hearing for the reasons as are fully set out in his motion filed, which are as follows:

1. He says that said opinion is in conflict with the Constitution of

the United States, and also the State of Kentucky, as well as the statutes of said State applicable in said case.

2. That said opinion is in conflict and in derogation of the common law operative in this State.

3. He says that same is in violation of his rights under the Constitution of the United States, and especially under the fourteenth amendment thereof, because the ruling therein deprives him
152 of his liberty without due process of law and denies to him the equal protection of the laws.

4. He says that same is in violation of the rights as guaranteed him under the fifth amendment of the Constitution of the United States, because it deprives him of his liberty without due process of law.

5. He says that same is in violation of the Constitution of the United States and in derogation of the common law, and more especially, the sixth amendment of said Constitution, because in the examination of said juror, J. C. Alexander, same was had by the court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant.

6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

SEC. 281. "What not subject to exception. The decisions of the court upon challenges to the panel, (*a*) and for cause (*b*), upon motions to set aside an indictment (*c*), and upon motions for a new trial (*d*), shall not be subject to exception."

is in conflict with the rights of the defendant under the Constitution of the United States as well as the constitution of Ken-
153 tucky and the common law obtaining in this State, and more especially in violation of sections five, six and fourteen of said Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in case of felony.

7. He says that the construction given by the court in said opinion, of section 281, is erroneous and prejudicial to his rights, in this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence — the defendant, and not to challenges made or heard either in the absence of said defendant or after the juror had been selected and accepted by both the Commonwealth and defendant, but he says that in the event said section is construed by this court to apply to said state of case, then, that same is in conflict with the Constitution of the United States and the common law operative in this State, as same deprives

the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

9. He says that as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case,
154 that the court may have a discretionery power over said juror before he is sworn, but there is a limitation upon said discretion, and that he cannot discharge him over the objection of the defendant simply because he has committed a contempt of court, as the court has the power to fine him or otherwise punish him for same, but not to deprive the defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark.

He suggests to the court that in the construction of section 281 of the Criminal Code of Practice of the State of Kentucky, the fact has been over-looked that same only applies to challenges made in felony cases in the selection of a jury in the presence of the defendant and not to challenges made and heard in his absence or after the juror had been selected and accepted by both the Commonwealth and the defendant, and he respectfully submits that if a different construction is given to said section, then it necessarily is in conflict with the ancient right of trial by jury and the Constitution of the United States.

It is thought that the court will ascertain upon a full examination of the authorities referred to in the opinion, that the cases there cited relate only to questions that arise and challenges made before the juror is accepted by both parties to the action.

WM. SMITH,
Att'y for Def't.

155 And afterwards on the 15th day of Ju-e, 1904 at a court of appeals held at the capitol at Frankfort the following order was entered:

HOWARD
vs.
COMMONWEALTH. } Franklin.

The court being sufficiently advised it is considered that appellant's motion and petition for rehearing be and the same is hereby overruled. Response delivered.

(Whole court sitting.)

And afterwards on the 16th day of June, 1904 at a court of appeals held at the capitol at Frankfort the following order was entered:—

HOWARD
vs.
COMMONWEALTH. } Franklin.

Comes the appellant by counsel, and on his motion it is ordered that the mandate shall not issue herein for forty days from this date.

156 The court delivered the following response to the motion and petition for rehearing, towit:

Court of Appeals of Kentucky, June 15, 1904.

JAMES B. HOWARD, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from Franklin Circuit Court.

Response to Petition for Rehearing by Judge Hobson.

The questions called to our attention in the petition for rehearing under the Constitution of the United States were considered by the court on the original hearing and we adhere to the conclusion there reached that no right of appellant under the fifth sixth or fourteenth amendment to the Constitution of the United States has been violated.

The motion for rehearing is overruled.

157 Court of Appeals, State of Kentucky.

JAMES B. HOWARD
vs.
COMMONWEALTH OF KY. } Murder.

To N. B. Hays, attorney general of the State of Kentucky; R. B. Franklin, Commonwealth's attorney for the 14th judicial district of the State of Kentucky, and B. G. Williams, special attorney appointed for the Commonwealth of Kentucky in said case:

You are hereby notified that on Saturday July 23rd, 1904, we, as attorney for Jas. B. Howard, in the above styled case, will enter a motion before the Hon. A. R. Burnam, chief justice of the court of appeals of State of Kentucky, for writ of error herein, and pray said chief justice to grant said writ of *the* error in the above styled case, from the Supreme Court of the United States of America to the court of appeals of the State of Kentucky from the judgment rendered herein, and final judgment affirming same rendered in said court of appeals as of date April 22nd, 1904 and the final

judgment upon the petition for rehearing rendered by said court of appeals June 15th 1904.

158 We will enter said motion between the hours of 10 o'clock a. m. and 12 o'clock noon, in the court room in the city of Frankfort, State of Kentucky and will then and there tendered and pray the court to permit us to file petition for writ of error assignment of errors, — other paper- required in the obtention of said writ and that a transcript of record, proceedings authenticated, may be sent to the United States Supreme Court, and that such other proceedings may be had as may be proper in premises.

J. A. VIOLET,
J. A. SCOTT,
CARLO LITTLE,
W. M. SMITH,
Attorneys for James B. Howard.

We accept service, this June 23 1904 of the within notice.

ROB'T B. FRANKLIN,
Com'lth's Att'y 14 Cir. Ct. Dist.
B. G. WILLIAMS, *Spec. Att'y.*
N. B. HAYS,
Attorney General of Ky.

[Endorsed:] James B. Howard *vs.* Comm'lth of Ky. Notice.

159 Court of Appeals of the State of Kentucky.

JAMES B. HOWARD, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Respondent.
} Petition for Writ of Error.

To the Hon. A. R. Burnham, chief justice of the court of appeals of the State of Kentucky:

Now comes James B. Howard the above named appellant, by his attorneys, J. A. Violett, J. A. Scott, Carlo B. Little and W. M. Smith, and complains and alleges that he is a citizen of the United States of America and a citizen and resident of the State of Kentucky.

Your petitioner respectfully shows that on the 17th day of April, 1900, he, together with Henry E. Youtsey, Berry Howard, Harlan Whittaker and Richard Combs, was indicted in the Franklin circuit court by the grand jury of said county of Franklin, State of Kentucky, charged with the crime of wilful murder of William Goebel, by shooting and wounding him with a gun or pistol loaded with powder and other explosives, and leaden and steel ball and other hard substance, on the 30th day of January, A. D., 1900 and from which said shooting and wounding, the said Goebel, on the 3rd day of Febru-

ary, 1900, died. It is also charged in said indictment that one of the above named defendants or another person then and there acting with them, but who is to the grand jury unknown, did then and there kill and murder said Goebel, and the other of said defendants did then and there counsel, advise, assist, aid and abet same, but which so actually fired the shot, and which so counselled,
160 advised, aided and abetted therein, is to the said grand jury unknown.

That on April 10, 1903, he, in the Franklin circuit court, was placed on trial on said charge contained in said indictment, and on the 30th day of April, 1903, the jury returned into court, the following verdict:

"We the jury, find the defendant guilty and fix his punishment at life imprisonment."

That on May 2, 1903, your petitioner filed in said court his motion and grounds for a new trial and affidavits in support of same, and thereupon, the court overruled said motion for a new trial, and adjudged that the defendant be taken by the sheriff of Franklin county to the State penitentiary, and there confined at hard labor for the period of his natural life, to all of which, your petitioner at the time objected and excepted, and prayed an appeal to the court of appeals of the State of Kentucky, which was granted. That on April 22, 1904, said court of appeals of the State of Kentucky, rendered an opinion and judgment in said case on said appeal, affirming said judgment of the trial court, whereupon, the time for filing a petition by the defendant, your petitioner, was extended by said court, until June 10, 1904, and afterwards, on June 7, 1904, and within said time allowed, your petitioner filed his petition and motion for a re-hearing in said court, which was, on June 15, 1904, overruled by said court, and thereupon said decision or judgment of the court of appeals became a final judgment. On June 16, 1904, the said court ordered that the mandate shall not issue herein for 40 days from this date.

That upon the trial of said case in said court, on April 10, 1903, the following proceedings, among others, were had—

161 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAMES B. HOWARD, Defendant. } Order.

Commonwealth's attorney Franklin, came into the court and in the presence of the accused and his counsel, stated that he had a matter that he desired to bring to the attention of the court, away from the presence of the jury. Thereupon, the court, counsel for the Commonwealth, the defendant in person, and his counsel, retired to the county judge's office. Thereupon, the attorney for the

Commonwealth filed the affidavit of Ben F. Hackett, and for reasons therein shown, moved the court to discharge juror J. C. Alexander, from service as a juror on the trial of this case, to which motion defendant by counsel objected and argument of counsel on both sides being heard upon the objection, it was agreed by counsel on either side that the court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to Hackett while in the custody of the sheriff, "Hello Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now excused as a juror in this case, and he is now ordered to be discharged; and the court being thus advised, overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel, excepts.

Thereupon the defendant moved the court to discharge the
162 entire panel remaining, which was objected to by attorney for the Commonwealth, and the court being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel, excepts, and filed the following bill of exceptions, to-wit:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JAS. B. HOWARD, Defendant.
} Bill of Exceptions.

Be it remembered: That on the trial of this case on the 10th day of April, 1903, there had been tested and accepted by both the Commonwealth and defendant herein, eleven jurors, J. C. Alexander being one of them, and the twelfth juror had been called and qualified himself, as a competent juror.

Thereupon the Commonwealth's attorney together with the attorneys assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterwards returned into court and filed the affidavit of Ben Hackett, which is as follows:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
JAS. B. HOWARD. } Affidavit of Ben Hackett.

The affiant, Ben Hackett, says that after the killing of Wm. Goebel, he and Mr. J. C. Alexander who had been accepted on the jury to try this case had many conversations and arguments about the said killing, this affiant expressing and urging the opinion
163 that there had been a conspiracy to murder Goebel among those who were charged with his murder and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him—these arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel—were frequent, and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case and after this affiant had been excused, after those accepted as jurors had been charged and admonished by the court, immediately after adjournment for supper and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were passing out through the court house yard, when in passing, Mr. Alexander said to this affiant, "Hello Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Affiant, Ben Hackett, says the foregoing statements are true.

(Signed) BEN F. HACKETT.

Subscribed and sworn to before me by Ben Hackett, this April 10, 1903.

JAS. H. POLSGROVE,
Co. Judge, Franklin Co.

and moved the court for reasons shown in said affidavit to discharge said J. C. Alexander from service as a juror on the trial of this case, to which the defendant by counsel, at the time objected and the court overruled said objection, and discharged said Alexander from service as a juror herein, to which the defendant at the time excepted, and still excepts. That at the time said motion was entered, and said Alexander was so discharged, the Commonwealth had exhausted of its peremptory challenges, three, and the defendant had exhausted of his peremptory challenges, twelve.

That on said motion to discharge said Alexander and be-
164 fore he was discharged, by agreement with counsel upon either side, the court privately examined said Alexander as

to the truth of the charges as to what he said to said Hackett, while he, Alexander, was in the custody of the sheriff; and the court thereupon being advised, discharged said Alexander as stated, to all said rulings of the court defendant at the time objected and excepted and objects and excepts and files this said bill of exceptions, duly signed and approved by the court.

JAS. E. CANTRILL, *Judge.*

That as appears by the record in this case, by the affidavit of Ben Hackett, two grounds are attempted to be made out to justify the court in excusing J. C. Alexander, the juror that had been accepted by both the Commonwealth and the defendant, but as it was shown that Hackett had theretofore qualified as a juror in said case, and had been peremptorily excused by the defendant, the court refused to consider the first ground stated in his affidavit, and considered only the second, that is, that said Alexander after he had been accepted as a juror and after said Hackett had been discharged, and after those accepted as jurors had been charged and admonished by the court, he, said Alexander, while in charge of the sheriff, said to Hackett, "Hello Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

The court, by agreement with counsel upon either side, privately examined said Alexander, separate and apart from defendant and his attorneys, as to the truth of the charges as to what he said to said Hackett while he, Alexander, was in the custody of the sheriff, and thereupon held that Alexander admitted said statement, but claimed that said statement was made in a jocular way, still the court was of the opinion that such conduct on the part of Alexander, was a violation of the admonition of the court, and thereupon, solely on account of such conduct, excused said Alexander from said panel. Thereupon the defendant moved to discharge the entire panel remaining, and the court overruled said motion, to which the defendant excepted.

165 The exclusion of said Alexander from said panel of said jury as stated, was objected and excepted to at the time by the defendant, and in his motion made and reasons filed for a new trial, is assigned as a reason for granting a new trial.

By section 7 of the "bill of rights" in the present constitution of the State of Kentucky, it is provided:

"The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution."

By section 11 of said "bill of rights," it is provided:

"In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of

his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

By sections 212 to 216 inclusive, of the Criminal Code of Practice of the State of Kentucky, it is provided:

"Challenges shall be tried and determined by the court in a summary manner, without the issues of law or fact arising thereon being reduced to writing, except when the court disallows a challenge for implied bias."

"The juror may be examined on oath by either party, upon the challenge."

"Other witnesses may also be examined, and their attendance coerced."

"The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins."

"The challenges of either party need not be all taken at once, but separately in the following order:

1. To the panel
2. To the juror for general disqualification
3. To the juror for implied bias
4. To the juror for actual bias
5. Peremptory.

166 By section 183 of said Code it is provided:

"If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial; unless his bail appear personally in court, and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. If he escape from custody after the trial has commenced, the trial may either be stopped or progress to a verdict, at the discretion of the Commonwealth's attorney; but judgment shall not be rendered until the presence of the defendant is obtained."

By section 250 of said Code, it is provided:

"If, after a juror has been accepted, but before the jury has been completed, one of the accepted jurors become so sick as to prevent the continuance of his duty, the court may excuse such juror, and complete the formation of the jury as if he had not been originally accepted."

And by section 281 of said Code, it is provided:

"The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

That on April 8, 1904, in said case, the following order was made, to-wit:

"The defendant, James B. Howard, having been twice tried under

this indictment in Franklin county, and the whole panel summoned, and in attendance at this court having been exhausted, and only one juror found qualified, and the court being satisfied that it would be impracticable to obtain a jury free from bias in Franklin county, it is now ordered that A. G. Jeffers, sheriff of Franklin county with sufficient deputies, proceed to Woodford county and there summon a special venire of one hundred and fifty (150) qualified jurors, Woodford county being in which it appears to the court that there is the greatest probability of obtaining impartial jurors and said jurors so summoned are to appear at the court house in Frankfort, Kentucky, at 2 o'clock on the 9th of April, 1903.

Upon the court's directing a special venire to be summoned in this case from Woodford county, the defendant moved the court to require said jurors to be drawn from the drum or wheel in
167 said county, as is required by law in the selection of jurors in said county when the regular panel is exhausted, and the court being advised, overruled said motion, to which the defendant excepts."

And on April 8, 1904, the further order was made, to-wit:

"It appearing that of the regular panel of twenty-four jurors drawn at the last term of this court to do jury service at this the present term, fifteen of said panel appeared and answered to their names, and were tested and for cause excused, and it further appearing that of the remainder of said panel some had died, some were excused on the certificates of physicians stating that they were, by reason of sickness, unable to attend court, and others were excused for reasons shown satisfactory to the court, and on motion of the attorneys for the defendant that these facts be made to appear of record, it is so ordered by the court."

In the motions and reasons for a new trial herein, defendant assigns the following error, to-wit:

"1st. Because the court erred in overruling the motion of defendant made herein to require that the one hundred and fifty jurors ordered to be summoned from the county of Woodford be drawn from the wheel or drum in said county as is required by law in the selection of jurors in said county when the regular panel is exhausted, to which ruling the defendant at the time excepted."

On said appeal prosecuted herein, the court of appeals of the State of Kentucky, adjudged and decided:

1st. That one charged with felony, can, in advance of the swearing of the jury, consent to the examination by the court, of a juror separate and apart from said defendant and his attorneys, against whom complaint had been made, after he had been tested and accepted by both the Commonwealth and the defendant, for the purpose of ascertaining whether or not he was qualified to re-
168 tain his place as one of the jurors to try the case, and that said examination of said juror so had herein, was not in conflict with or a violation of the fourteenth amendment of the Constitution of the United States of America, or any clause thereof,

and did not deprive plaintiff in error, James B. Howard, of his liberty without due process of law, or deprive him of the rights, privileges and immunities secured to him and other citizens of the United States of America, and the State of Kentucky, or was a denial to him of the equal protection of the law.

2nd. That the record must affirmatively show that an injury resulted to the substantial rights of the appellant by the dismissal from the jury of said Alexander.

3rd. That said court of appeals is expressly forbidden by section 281 of the Criminal Code of Kentucky, to reverse for any error committed in the excluding of Alexander from the jury.

4th. That said court, by reason of said section 281 of said Code, is without power to revise any error in the manner of the formation or selection of the jury.

5th. That section 281 of the Criminal Code of the State of Kentucky, or the authority exercised thereunder, is not repugnant to the Constitution of the United States or the fifth, sixth or fourteenth amendment thereto, or any statute thereof, or any right, title, privilege or exemption exercised thereunder, or in derogation of the common law, or the Constitution or statute of the State of Kentucky.

That on the trial and on both the original appeal and on the motion made and petition filed by defendant for a re-hearing, in the court of appeals for the State of Kentucky, all five of these propositions determined by said court, were made and presented to said court as raising a Federal question, and so considered and passed upon and decided by it.

And the said court in overruling said motion for a re-hearing, says:

169 "The questions called to our attention in the petition for a re-hearing under the Constitution of the United States, were considered by the court on the original hearing, and we adhere to the conclusion there reached, that no right of appellant, under the fifth, sixth or fourteenth amendment to the Constitution of the United States, has been violated."

That each and all of said propositions stated, raised a Federal question in said case, namely:

1st. Whether in the trial of an indictment against a defendant charged with a felony, he and his attorney can, before the jury has been sworn, but after one of said jurors had been tested and accepted by both the Commonwealth and defendant, consent to the examination by the court, separate and apart from defendant and his attorney, of said juror who has been so accepted, against whom a complaint had been made, for the purpose of ascertaining whether or not he was qualified to retain his place as one of the jurors to try the case, or whether said examination of said juror so had, was not in conflict with and a violation of the fourteenth amendment of the Constitution of the United States of America, or a clause thereof, or whether it deprived plaintiff in error of his liberty without due process of law,

or of the rights, privileges and immunities secured to him and other citizens of the United States of America and State of Kentucky, or was a denial to him of the equal protection of the law.

2nd. Whether the record must show affirmatively that an injury resulted to the substantial rights of appellant by the dismissal, by the court, of Alexander from the jury after he had been tested and accepted by both the Commonwealth and the said appellant, Howard, or whether said ruling deprived plaintiff in error of his liberty, without due process of law.

3rd. Whether the said court of appeals is forbidden to reverse for an error committed by the trial court in dismissing said Alexander from said jury, or whether said ruling deprived plaintiff in error of his liberty without due process of law.

4th. Whether by reason of section 281 of the Criminal Code of Kentucky, the said appellate court is without power to revise
170 an error committed by the trial court in the manner of the formation or selection of the jury.

5th. Whether section 281 of said Code of Practice of Kentucky or the authority exercised thereunder, is in conflict with or a violation of the Constitution of the United States of America, and especially the fifth, sixth and fourteenth amendments of said Constitution, or of the right, title, privilege or exemption exercised under said Constitution or any clause thereof, or of the statutes of the United States of America or the authority exercised thereunder, or whether it is in derogation of the common law, or the law of the land.

Your petitioner alleges and contends that each and all said five propositions so decided and adjudged by said trial court and the court of appeals, are a violation of and in conflict with the Constitution and laws and statutes of the United States and the authority exercised thereunder, and they and each of them are in derogation of the common law, and are contrary to the constitution and laws of the State of Kentucky and the authority exercised thereunder, and deprived said Howard of his liberty without due process of law, and deprived him of the rights, privileges and immunities secured to other citizens of the United States of America and the State of Kentucky.

That said judgment of said court of appeals is a final judgment in the highest court in the State of Kentucky in which a decision in said suit or prosecution, could or can be had, that Federal questions were raised therein as stated herein, and that a decision of all of said Federal questions was necessary to the judgment rendered.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the court of appeals of the State of Kentucky in said case, and prays that a writ of error to said court of appeals of the State of Kentucky be allowed; that the citation be granted and signed; and that upon compliance with the terms of the
171 statute in such cases made and provided, said writ of error may operate — a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States and the

judgment aforesaid of said court of appeals of the State of Kentucky, be reversed.

JAMES B. HOWARD,
By Attorneys in Law and Fact,
W. M. SMITH,
J. A. VIOLETT,
CARLO LITTLE,
J. A. SCOTT,
Attorneys and of Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed, this the 23rd day of July, A. D. 1904. The writ of error to operate as a supersedeas.

Dated at Frankfort, Kentucky, this 23rd day of July, A. D. 1904.

A. R. BURNAM,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed in my office this 23rd day of July, A. D. 1904.

J. MORGAN CHINN,
Clerk of the Court of Appeals of the State of Kentucky,
By W. B. O'CONNELL,
Deputy Clerk.

172 Court of Appeals of the State of Kentucky.

JAMES B. HOWARD, Plaintiff in Error,
vs.
THE COMMMONWEALTH OF KENTUCKY, Defendant in Error. } Assignment of Errors.

Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the court of appeals of the State of Kentucky, in the above entitled matter there is manifest error in this, to-wit:

1st. The court erred in holding that James B. Howard on trial herein charged with a felony, could, together with his attorney, before the jury was sworn, but after one of said jurors had been tested and accepted by both the Commonwealth of Kentucky and said defendant, Howard, consent to the examination by the court, separate and apart from defendant Howard, and his attorney, of said juror who had been so accepted, against whom a complaint had been made, for the purpose of ascertaining whether or not he was qualified to retain his place as one of the jurors to try the case, and that said examination of said juror so had herein was not in conflict with or a violation of the fourteenth (14) amendment of the Constitution of the United States of America or any clause thereof, and did not deprive plaintiff in error, James B. Howard, of his liberty with-

out due process of law, or deprive him of the rights, privileges or immunities secured to him and other citizens of the United States and the State of Kentucky, and did not deny to him the equal protection of the law.

2nd. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the fourteenth (14) amendment to the Constitution of the United States of America, and that it did not deny to plaintiff in
173 error the equal protection of the law, or abridged his privileges and immunities secured to him by said amendment.

3rd. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, title, privileges or exemptions exercised under the fourteenth amendment to the Constitution of the United States of America.

4th. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with or in derogation of the common law.

5th. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with "the law of the land," and that it did not abridge the privileges and rights or immunities of said Howard secured to him as a citizen of the United States and State of Kentucky, or deprived him of the equal protection of the law.

6th. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was and is due process of law, and that it did not deprive said James B. Howard of his liberty without due process of law.

7th. The court erred in holding herein that its said ruling, as set forth in assignment No. 1 herein, was not repugnant to or in conflict with the statute of the United States of America, and the authority exercised thereunder.

8th. The court erred in holding that the record must affirmatively show that an injury resulted to the substantial rights of said James B. Howard, by the dismissal, by the court, of J. C. Alexander from the panel of said jury after he had been tested and accepted by both the Commonwealth of Kentucky and said Howard, and in holding that said ruling did not deprive said Howard of the equal protection of the law.

174 9th. The court erred in holding that its said ruling as set forth in assignment No. 8, was due process of law, and that defendant was not thereby deprived of his liberty without due process of law.

10th. The court erred in holding that it, the said court, was expressly forbidden, by reason of section 281 of the Criminal Code of Practice of the State of Kentucky, from reversing said case for an error committed by the trial court in dismissing said Alexander from said panel of the jury after he had been accepted by both the Commonwealth of Kentucky and the defendant, James B. Howard,

and in holding that said ruling did not abridge the privileges and immunities of said Howard as a citizen of the United States.

11th. The court erred in holding that its said ruling, as set forth in assignment No. 10 herein, was or is due process of law, and that it did not deprive said Howard of his liberty without due process of law.

12th. The court erred in holding that by reason of section 281 of the Criminal Code of Practice of the State of Kentucky, it, the said court, was without power to revise an error committed by the trial court in the manner of the formation or selection of the trial jury, and in holding that said ruling did not abridge the rights, privileges and immunities of said plaintiff in error.

13th. The court erred in holding that its said ruling, as set forth in assignment No. 12 herein, was due process of law, and in holding that it did not deprive said Howard of his liberty without due process of law, and that it did not deprive him of the rights, privileges and immunities secured to other citizens of the United States of America and the State of Kentucky.

14th. The court erred in holding that section 281 of the Criminal Code of Practice of the State of Kentucky, or the authority exercised thereunder, is not in conflict with or a violation of the fourteenth (14) amendment of the Constitution of the United States or any clause thereof, and that said section does not abridge the rights, privileges or immunities secured to plaintiff in error as a citi-
175 zen of the United States of America and State of Kentucky, and in holding that it does not deny him due process of law and is not in conflict with the "law of the land."

15th. The court erred in holding that the enactment by the State of Kentucky, of said section 281 of its Criminal Code of Practice, was not the making of a law that was in conflict with or a violation of the fourteenth amendment of the Constitution of the United States of America or any clause thereof, or the common law, and that it did not abridge the privileges or immunity of said Howard secured to him.

16th. The court erred in holding that the authority exercised under said section 281 of said Code, and the construction given said section 281 by the courts of said State of Kentucky, and enforced herein, was not in conflict with or a violation of the fourteenth amendment to the Constitution of the United States of America, or the common law, and that it did not abridge the rights, privileges and immunities of said Howard secured to him.

17th. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not in conflict with or repugnant to the right secured to plaintiff in error herein, by the eleventh (11) section of the "bill of rights," in the constitution of the State of Kentucky, "to be heard by himself and counsel," and "to meet the witnesses face to face," and was not in conflict with or repugnant to "the law of the land" or the common law.

18th. The court erred in holding that the enactment by the State

of Kentucky of said section 281 of its Criminal Code of Practice, was not in conflict with or in derogation of "the law of the land."

19th. The court erred in holding that its said ruling set forth in assignment No. 1 herein, was not a violation of or in conflict with the fifth (5) amendment to the Constitution of the United States of America, as depriving plaintiff in error of his liberty without due process of law.

20th. The court erred in holding that its said ruling, set forth
176 in assignment No. 1 herein, was not a violation of or in conflict with the sixth amendment to the Constitution of the United States of America, or the clause thereof, giving, in criminal prosecutions, the accused the right to be heard by himself and counsel, and to be confronted with the witnesses against him.

21st. That the court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the fifth (5) amendment to the Constitution of the United States of America.

22nd. The court erred in holding herein, that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the sixth (6) amendment to the Constitution of the United States of America.

Plaintiff in error, James B. Howard, prays that a writ of error from the Supreme Court of the United States of America, may issue to the court of appeals of the State of Kentucky, and further, that the Supreme Court of the United States of America will reverse the said final order and judgment of the court of appeals of the State of Kentucky, and that he may be restored to all things which he has lost by the action, and because of the said judgment and decision.

W. M. SMITH,
J. A. VIOLETT,
J. A. SCOTT,
CARLO LITTLE,
Attorneys and Counsellors for Plaintiff in Error.

Filed in clerk's office of the court of appeals at Frankfort, Ky., this the 23rd day of July, 1904.

J. MORGAN CHINN, *C. C. A.*,
By W. B. O'CONNELL, *Deputy Clerk.*

177 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the

State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit (or prosecution) between James B. Howard, defendant and plaintiff in error, and The Commonwealth of Kentucky, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of the United States and of the authority exercised under said statute and the decision was against their validity, and wherein was drawn in question the validity of a statute of the State of Kentucky and the authority exercised under said statute, on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege and exemption specifically set up and claimed under such clause of said Constitution, and manifest error hath happened to the great damage of the said James B. Howard, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 22 day of August next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein, to correct that error,
178 what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 23 day of July, 1904.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of the State of Kentucky.
By W. B. O'CONNELL,
Deputy Clerk.

Allowed by

A. R. BURNAM,
Chief Justice of the Court of Appeals of the State of Kentucky.

179 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of the State of Kentucky:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in

the clerk's office of the court of appeals of the State of Kentucky, wherein, James B. Howard is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, A. R. Burnam, chief justice of the court of appeals of the State of Kentucky, this the 23rd day of July, A. D., 1904.

A. R. BURNAM,
Chief Justice Court of Appeals, Ky.

Copy of the within citation received, this 23rd day of July, A. D., 1904, at the office of the attorney general of the State of Kentucky.

N. B. HAYS,
Attorney General.
B. G. WILLIAMS,
Special Attorney for the Commonwealth.

180 Court of Appeals of the State of Kentucky.

JAMES B. HOWARD, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Respondent. } Order.

JULY 23, 1904.

This day, W. M. Smith, attorney for James B. Howard, and N. B. Hays attorney general of the State of Kentucky and B. G. Williams special counsel for prosecution appeared before the Hon. A. R. Burnam chief justice of the court of appeals of the State of Kentucky, in the court of appeals room at Frankfort, Kentucky, and said W. M. Smith filed a notice duly accepted June 23, 1904, by N. B. Hayes, attorney general of the State of Kentucky, R. B. Franklin, Commonwealth's attorney for the 14th judicial district, and B. G. Williams, special attorney for the prosecution in said case, giving them notice that he would, in the above styled case, on July 23, 1904, enter a motion before said Burnam, chief justice aforesaid, for a writ of error in behalf of appellant, James B. Howard, in the above styled case, from the Supreme Court of the United States of America to the court of appeals of the State of Kentucky, from the final judgment rendered herein in said court of appeals, and that he will then tender and file his petition for said writ of error and an assignment of errors; and thereupon, on this July 23, 1904, said Smith as attorney aforesaid, filed in the clerk's office of the said court of appeals, the petition for a writ of error and an assignment of errors, and said motion so entered then coming on to be heard upon the petition of appellant herein for a writ of error from the Supreme Court of the United States to the court of appeals of the

State of Kentucky, and upon examination of said petition and the record in said matter, and desiring to give petitioner an opportunity to present in the Supreme Court of the United States, the questions presented by the record in said matter, it is ordered that a writ of error be, and is hereby, allowed, to this court from the Supreme Court of the United States, the said writ of error to operate
181 as a supersedeas, and stay of execution and proceedings herein pending such writ of error, and said writ having been issued and filed in the clerk's office of this court, together with a copy lodged in said clerk's office for the Commonwealth of Kentucky, and a citation as required by law thereon having been duly issued, same was duly returned and filed in said clerk's office, endorsed, "Accepted" by the attorney general, Commonwealth's attorney for the 14th judicial district and the special attorney for the prosecution in said case, to all of which the State of Kentucky by its attorney general objects and excepts.

A. R. BURNAM,
Chief Justice Court of Appeals of Kentucky.

182 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit (or prosecution) between James B. Howard, defendant and plaintiff in error, and The Commonwealth of Kentucky, plaintiff and defendant in error wherein was drawn in question the validity of a statute of the United States and of the authority exercised under said statute and the decision was against their validity, and wherein was drawn in question the validity of a statute of the State of Kentucky and the authority exercised under said statute, on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege and exemption specifically set up and claimed under such clause of said Constitution, and manifest error hath happened to the great damage of the said James B. Howard, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you if judgment be given therein, that

then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 22nd day
183 of August next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3rd day of August, 1904.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

Allowed by

A. R. BURNAM,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed Aug. 3 1904

J. MORGAN CHINN, *C. C. A.*

184 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of the State of Kentucky:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, on August 22, 1904, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein, James B. Howard is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, A. R. Burnam, chief justice of the court of appeals of the State of Kentucky, this the 5th day of August, A. D., 1904.

A. R. BURNAM,
Chief Justice of the Court of Appeals of Kentucky.

Copy of the within citation received, this 5th day of August, A. D. 1904, at the office of the attorney general of the State of Kentucky.

N. B. HAYS,
Attorney General,
By LORAINE MIX, *Assistant.*

STATE OF KENTUCKY, }
County of Franklin. }

I J. W. Jefferies state that on the 5 day of August 1904 I executed the within writ on N. B. Hays the attorney general of the State of Kentucky by leaving a copy thereof in his office in Frankfort Ky., with L. Mix his assistant.

That I am of age and not connected with or interested in said case.

A. G. JEFFERS, *S. T. C.*,
By J. W. JEFFERS, *D. S.*

Subscribed and sworn to before me by J. W. Jefferies this August *Aug.* 5 1904.

J. MORGAN CHINN, *C. C. A.*

185 Court of Appeals, State of Kentucky.

I, J. Morgan Chinn, clerk of the court of appeals of the State of Kentucky, certify that on August the 3rd, 1904, the writ of error hereto attached, from the Supreme Court of the United States to the court of appeals of the State of Kentucky, in the case of Jas. B. Howard, plaintiff in error, *vs.* The Commonwealth of Kentucky, defendant in error, was filed in my office, together with a copy thereof, which was left for defendant in error. And that the citation hereto attached, with the return thereon, was filed in my office August the 5, 1904.

In witness whereof, I, J. Morgan Chinn, clerk of the court of appeals of the State of Kentucky, have hereto attached my seal and signature this, the 5 day of August, 1904.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk of Court of Appeals.

186 Supreme Court of the United States, October Term, 1904.

JAMES B. HOWARD, Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY, Defendant in Error. } No. 338.

It is hereby stipulated between W. M. Smith, attorney for James B. Howard, plaintiff in error, and N. B. Hays, attorney general of the State of Kentucky, attorney for defendant in error, that in the printing of the transcript herein, the evidence heard on said trial

and included in said transcript may be omitted—that is, that all said transcript filed be printed except said evidence.

This, August 8, 1904.

W. M. SMITH,
Attorney for James B. Howard.
N. B. HAYS,
Attorney General.
IRA JULIAN,
Att'y for Def'ts in Error.

187 [Endorsed:] File No. 19438 Supreme Court U. S., October term, 1904 Term No. 338 James B. Howard, plaintiff in error, *vs.* The Commonwealth of Kentucky. Stipulation to omit parts of record in printing. Filed August 19, 1904.

Endorsed on cover: File No. 19,438. Kentucky court of appeals. Term No. 338. James B. Howard, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed August 8th, 1904. File No. 19,438.

RECEIVED
NOV 21 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 336.

JAMES B. HOWARD, - - - - - Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY. } - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

"The right of the accused, as protected by the Fourteenth Amendment, to be present in prosecutions for felony during the trial."

Brief of W. M. SMITH, on behalf of Plaintiff in Error.

W. M. SMITH,
Attorney for Plaintiff in Error.

J. A. VIOLETT,
J. A. SCOTT,
CARLO B. LITTLE,
Of Counsel.

F. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

No. 338.

JAMES B. HOWARD, - - - - - - *Plaintiff in Error*,

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error*.

BRIEF FOR PLAINTIFF IN ERROR.

A writ of error was issued herein on the 23d day of July, 1904, from this court to the Court of Appeals of the State of Kentucky, in behalf of James B. Howard, plaintiff in error, against the Commonwealth of Kentucky, seeking to have reviewed the judgment and decision rendered herein by the Court of Appeals of the State of Kentucky, on the 22d day of April, 1904 (see printed record, pages 64–72), and the judgment on the petition for a rehearing, rendered by said court on June 15, 1904, affirming said original judgment and decision. (See printed record, pages 77–78.)

Statement.

On the 17th day of April, 1900, James B. Howard, together with Henry E. Youtsey, Berry Howard, Harlan Whittaker and Richard Combs, was indicted in the Franklin Circuit Court by the grand jury of said County of Franklin, State of Kentucky, charged with the crime of wilful murder

of William Goebel, by shooting and wounding him with a gun or pistol loaded with powder or other explosives, and leaden or steel ball or other hard substance, on the 30th day of January, A. D. 1900, and from which said shooting and wounding, the said Goebel, on the 3d day of February, 1900, died. It is also charged, in said indictment, that one of the above named defendants, or another person then and there acting with them, but who is to the grand jury unknown, did then and there kill and murder said Goebel, and the other of said defendants did then and there counsel, advise, assist, aid and abet same, but which so actually fired the shot, and which so counseled, advised, aided and abetted therein, is to the said grand jury unknown. (See printed record, pages 1 and 2.)

On April 10, 1903, said Howard having been placed on trial in the Franklin Circuit Court, on the charge contained in said indictment, on the 30th day of April, 1903, the jury returned the following verdict:

> "We, the jury, find the defendant guilty, and fix his punishment at life imprisonment." (See printed record, page 21.)

On May 2, 1903, Howard filed in said court his motion and grounds for a new trial and affidavits in support of same (see printed record, pages 47 to 54), and thereupon the court overruled said motion for a new trial, and adjudged that the defendant be taken by the sheriff of Franklin County to the State Penitentiary, and there confined at hard labor for the period of his natural life, to all of which Howard at the time objected and excepted, and prayed an appeal to the Court of Appeals of the State of Kentucky, which was granted. (See printed record, pages 61 to 62.)

On April 22, 1904, the Court of Appeals of the State of Kentucky rendered an opinion and judgment in said case on said appeal, affirming said judgment of the trial court (see printed record, pages 64 to 72), whereupon the time for filing a petition for a rehearing by the defendant, Howard, was extended by said court until June 10, 1904 (see printed record, page 73), and afterwards, on June 7, 1904, and within said time allowed, he filed his petition and motion for a rehearing (see printed record, pages 73 to 77), which was, on June 15, 1904, overruled by said court (see printed record, page 77), and thereupon said decision and judgment of the Court of Appeals became a final judgment.

On June 16, 1904, the court ordered that "the mandate shall not issue herein for forty (40) days from this date." (See printed record, pages 77 to 78.)

On the trial of the said case in the Circuit Court, on April 10, 1903, the following proceedings, among others were had.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - - *Plaintiff*,

vs. Order.

Jas. B. Howard, - - - - - - - - - *Defendant*.

Commonwealth's Attorney Franklin came into the court, and in the presence of the accused and his counsel stated that he had a matter that he desired to bring to the attention of the court, away from the presence of the jury. Thereupon the court, counsel for the Commonwealth, the defendant in person, and his counsel, retired to the county judge's office. Thereupon, the attorney for the Commonwealth filed the affidavit of Ben F. Hackett, and for reasons therein shown moved the court to discharge juror J. C. Alexander

from service as a juror on the trial of this case, to which motion defendant by counsel objected, and argument of counsel on both sides being heard upon the objection, it was agreed by counsel on either side that the court might, in the absence of the defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to Hackett while in the custody of the sheriff, "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that SUCH CONDUCT on the part of Alexander was a violation of the *admonition of the court, when he was placed in the custody of the sheriff* (italics are ours), it was ordered and adjudged that said Alexander be, and he is now excused as a juror in this case, and he is now ordered to be discharged, and the court, being THUS ADVISED, overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel excepts.

Thereupon *the defendant moved the court to discharge the entire panel remaining* (italics are ours), which was objected to by attorney for the Commonwealth, and the court, being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant, by counsel, excepts, and filed the following bill of exceptions, to wit:

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - *Plaintiff*,
vs. Bill of Exceptions.
James B. Howard, - - - - - - *Defendant.*

BE IT REMEMBERED: *That on the trial of this case* (italics are ours), on the 10th day of April, 1903, there had been

tested and accepted by both the Commonwealth and defendant herein, eleven jurors, J. C. Alexander being one of them, and the twelfth juror had been called and qualified himself as a competent juror.

Thereupon the Commonwealth's attorney, together with the attorneys assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterward returned into court and filed the affidavit of Ben Hackett, which is as follows:

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky

vs. Affidavit of Ben Hackett.

James B. Howard.

The affiant, Ben Hackett, says that after the killing of William Goebel he and Mr. J. C. Alexander, who had been accepted on the jury to try this case, had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him. These arguments and conversations occurred at different times and places in Woodford County during the time that has elapsed since the murder of Mr. Goebel, were frequent, and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case, and after this affiant had been excused, after those accepted as jurors had been charged and admonished by the court, immediately after adjournment for supper and as the jury was being conducted by the sheriff away from the courthouse, affiant by accident met the jury as they were passing out through the courthouse yard, when, in passing, Mr.

Alexander said to this affiant, "Hello, Ben; I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Affiant, Ben Hackett, says the foregoing statements are true.

(Signed) BEN F. HACKETT.

Subscribed and sworn to before me by Ben Hackett, this April 10, 1903.

JAMES H. POLSGROVE,
County Judge, Franklin County.

And moved the court, for reasons shown in said affidavit, to discharge said J. C. Alexander from service as a juror on the trial of this case, to which the defendant, by counsel, at the time objected, and the court overruled said objection, and discharged said Alexander from service as a juror herein, to which the defendant at the time excepted, and still excepts. That at the time said motion was entered, and said Alexander was so discharged, the Commonwealth had exhausted of its peremptory challenges three, and the defendant had exhausted of his peremptory challenges twelve.

That on said motion to discharge said Alexander, and before he was discharged, by agreement with counsel upon either side, the court privately examined said Alexander as to the truth of the charges as to what he said to said Hackett WHILE HE, ALEXANDER, WAS IN THE CUSTODY OF THE SHERIFF; AND THE COURT THEREUPON, BEING ADVISED (small capitals are ours), discharged said Alexander as stated. To all said rulings of the court defendant at the time objected and excepted, and objects and excepts, and files this said bill of exceptions, duly signed and approved by the court.

JAS. E. CANTRILL, Judge.

(See printed record, pages 32 to 35.)

That, as appears by the record in this case, by the affidavit of Ben Hackett, two grounds were attempted to be made out to justify the excusing of J. C. Alexander, the juror that had been accepted by both the Commonwealth and the defendant, but as it was shown that Hackett had theretofore *qualified as a juror* in said case, and had then been peremptorily excused by the defendant, *the court refused to consider the first ground stated in his affidavit*, and considered only the second, that is, that said Alexander, after he had been accepted as a juror, and after said Hackett had been discharged, and after those accepted as jurors had been charged and admonished by the court, he, said Alexander, while in charge of the sheriff, said to Hackett: "*Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.*"

As shown, the court, by agreement of *counsel upon either side*, did privately examine said Alexander, separate and apart from defendant and his attorneys, *as to the truth of the charges as to what he said to said Hackett while he, Alexander, was in the custody of the sheriff*, and thereupon held that Alexander admitted said statement, but claimed that said statement was made in a jocular way; still the court was of the opinion that SUCH CONDUCT, on the part of Alexander, was a violation of the admonition of the court, and thereupon, *solely on account of* SUCH CONDUCT, over the objections of defendant, Howard, discharged said Alexander from said panel. Thereupon said defendant *moved to discharge the entire panel remaining*, and the court overruled said motion, to which the defendant excepted.

The exclusion of said Alexander from said panel of said jury, as stated, was objected and excepted to at the time by the defendant, and in his motion made and reasons filed for a new trial is assigned as a reason for granting a new trial;

said motion for a new trial having been overruled, defendant reserved exceptions to said ruling.

On April 8, 1903, in said case, the following order was made, to wit:

> "The defendant, Jas. B. Howard, having been twice tried under this indictment in Franklin County, and the whole panel summoned and in attendance at this court having been exhausted, and only one juror found qualified, and the court being satisfied that it would be impracticable to obtain a jury free from bias in Franklin County, it is now ordered that A. G. Jeffers, sheriff of Franklin County, with sufficient deputies, proceed to Woodford County, and there summon a special venire of one hundred and fifty (150) qualified jurors, Woodford County being in which it appears to the court that there is the greatest probability of obtaining impartial jurors, and said jurors so summoned are to appear at the court-house in Frankfort, Kentucky, at 2 o'clock, on the 9th of April, 1903."

Upon the court directing a special venire to be summoned in this case from Woodford County, the defendant moved the court to require said jurors to be drawn from the drum or wheel in said county, as is required by law in the selection of jurors in said county when the regular panel is exhausted, and the court, being advised, overruled said motion, to which the defendant excepts. (See printed record, page 5.)

And on April 8, 1903, the further order was made, to wit:

> "It appearing that of the regular panel of twenty-four jurors drawn at the last term of this court to do jury service at this the present term, fifteen of said panel appeared and answered to their names, and were tested and for cause excused, and it further appearing that of the remainder of said panel some had died, some were excused on the certificates of physicians stating that they were, by reason of sickness, unable to attend court, and

others were excused for reasons shown satisfactory to the court, and on motion of the attorneys for the defendant that these facts be made to appear of record, it is so ordered by the court." (See printed record, page 31.)

DECISION OF THE COURT OF APPEALS OF KENTUCKY.

In the original opinion of the Court of Appeals of Kentucky (printed record, pages 64 to 72), affirming the proceedings herein in the lower court, it is said:

"First. It is contended that the court erred in the formation of the jury in that by its order for the summoning of 150 jurors from the County of Woodford it was not required that they be drawn from the jury wheel or drum of that county, but only that they be summoned from the county at large by the sheriffs of Franklin county. In Curtis vs. Commonwealth, 23 L. R., 267, it was held that the manner of selecting the jury in that case was error, but as Section 281 of the Criminal Code of Practice provides that—

"'The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception,'

this court is without power to revise such an error. In several cases subsequently decided, the most recent being that of Turner vs. Commonwealth, the opinion in which is yet unpublished, the rule announced in Curtis vs. Commonwealth, *supra*, was adhered to and approved. We find it unnecessary, therefore, to decide whether or not there was error in the manner of summoning the jury, or in its formation, as a reversal by this court upon that ground, even if such error had been committed, would be unauthorized.

"Another alleged error complained of by appellant was the discharge by the trial court of the juror, J. C. Alexander.

"It appears that he and ten others had been accepted by the parties as jurors, and that but one other was to be selected in order to complete the panel of twelve. The Commonwealth had then exhausted three of its peremptory challenges, and the appellant twelve of his, though neither party had been required to or had exercised the right of peremptory challenge, except as there were twelve men in the jury box who had, upon the *voire dire*, been found qualified. At this point it was suggested to the court by the Commonwealth's attorney, out of hearing of the jury that had thus been partly made up, that he had just received information to the effect that J. C. Alexander had theretofore formed and expressed an opinion as to the merits of this case, and with respect to the crime charged in the indictment, and had, after he was accepted on the jury, improperly conversed with a person not a member of the jury, on a subject connected with the case, notwithstanding the previous admonition of the court not to do so. This communication of the Commonwealth's attorney was immediately followed by a motion from him to discharge Alexander from the jury, in support of which was filed the affidavit of Ben Hackett, who had himself been excused as a juror in the case.

"It was stated in the affidavit, in substance, that the affiant and Alexander, after the death of William Goebel, had many conversations and arguments about the killing, in which affiant contended that there had been a conspiracy to murder Goebel among those who were charged with his murder, and Alexander expressed and urged the opinion that there had not been such a conspiracy. That, in these conversations, both affiant and Alexander manifested much earnest interest and feeling. And, further, that after Alexander and some other members of the jury had been accepted, put in charge of the sheriff, and admonished by the court, he said to the affiant, after adjournment on the day before the filing of the affidavit, and as the jury were passing out through the courthouse yard, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'"

Before passing upon the motion of the Commonwealth's attorney, the court privately examined Alexander, while the

latter was in the custody of the sheriff, touching the truth of the charges contained in the affidavit of Hackett, and, as the result of such examination, discharged him from the jury.

It was stated by counsel for the Commonwealth in the oral argument and by brief in this court, and not denied in the oral argument or brief of counsel for appellant, that the examination of Alexander was conducted privately by the court at the request of counsel for appellant, made in the latter's presence and with his consent. Be that as it may, in ascertaining what transpired in the lower court in this case, we must look to and be governed by the record made therein, and it appears from the record that the privy examination of Alexander was made by consent of the parties, though it further appears that appellant, at the time of the discharge of Alexander, excepted to such discharge, and moved the court to also discharge the ten persons remaining of the jury, which the court refused to do, but proceeded to complete the jury, subject to the right of challenge by either party to the extent of the challenges remaining to them, by selecting from the persons summoned from Woodford County for that purpose the two necessary to complete the panel of twelve.

As what occurred in the privy examination of Alexander does not appear in the bill of exceptions, we are unable to know whether he admitted or denied the statements made in the affidavit of Hackett, except that it does appear in the bill of exceptions that he made the admission—presumably before the privy examination—that he said to Hackett, after the latter had been excused from the jury, and he had been accepted as a member thereof, "Hello, Ben, I am glad that they cut you off of this jury, as I did not want to serve on this jury with you," but claimed that it was made in a jocular way.

It is insisted for the Commonwealth that Alexander's admission as to the above statement warrants the conclusion that what was said in the affidavit of Hackett, as to arguments between Alexander and himself involving the merits of this case, is true; otherwise what reason did Alexander have for not wishing to serve with Hackett on the jury?

In this view of the matter it is argued that the action of the lower court, in discharging Alexander from the jury, was not an abuse of discretion.

On the other hand, it is insisted for appellant that it was error for the court to examine Alexander in his absence, and that he could not legally waive his right to be present at such examination. In support of this contention, Section 183, Criminal Code, is relied on, which provides:

> "If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial. * * * "

While the court in construing the section, *supra*, has repeatedly held that one charged with the commission of a felony can not be tried during his absence from the court room, we find that cases have arisen in which it has been deemed necessary to relax that rule. Thus in Hite vs. Commonwealth, 14 L. R., 308, it was held that the occasional absence from the court room of the accused, on account of temporary illness for a few minutes at a time, the trial continuing in his absence, did not prejudice the substantial rights of the accused. In Meece vs. Commonwealth, 78 Ky., 586, it appeared that after the submission of the case to the jury and their retirement to the jury room, they returned into court and asked for further instructions. The court declined to give any, but, in the presence of counsel for the prisoner, inserted by interlineation certain words in one of

the instructions. The accused was absent at the time, and it was argued in his behalf that for this reason the judgment should have been reversed. This court, however, held otherwise, in doing which it said:

> While we recognize the fact that the accused, when on trial for a criminal offense, should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence, either before or after the submission of the cause to the jury, still this court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist, except by the legislation of the State on the subject, and when permitting an appeal the law-making power has the right to determine for what cause a reversal may be had. * * * "

It has also been held by this court that a trial for felony begins when the jury is sworn. Willis vs. Commonwealth, 86 Ky., 68. At the time the examination of Alexander took place, and when he was discharged, the jury had not only not been sworn, but it had not been completed.

There are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive, such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court, as was the appel-

lant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jury to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury.

It is, however, beyond our province to reverse this case for error, if there were any, in excluding Alexander from the jury. Our right to do so is expressly forbidden by Section 281 of the Criminal Code, and we have already referred to Curtis vs. Commonwealth, 23 L. R., 267, and Turner vs. Commonwealth (yet unpublished), to indicate this court's construction of that section. In addition to those cases, a further recent authoritative utterance of this court to the same effect will be found in Alderson vs. Commonwealth, 25 L. R. 32, in which one of the grounds for reversal, as set forth in the record, was that the appellant, over his objection at the time, was forced by the trial court to accept as jurymen persons alleged to have formed an opinion as to his guilt or innocence.

Another alleged error was that, after the Commonwealth had accepted in open court the full panel of twelve jurymen, and after they had been passed to the appellant for acceptance or peremptory challenge, and he and his counsel had retired from the courthouse to pass upon the panel, the court, over appellant's objection, permitted the Commonwealth to object to and excuse one of the jurymen without cause, though the whole twelve had been accepted by it.

Whereupon appellant, as was done in the case at bar, moved the court to dismiss the entire jury, which motion was overruled.

In passing on the questions thus presented, this court, after quoting Section 281 of the Criminal Code, *supra*, said:

> "In construing this section, we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal."

Whatever may be the rule in other States, this question has been settled in Kentucky as herein indicated, and the authorities cited are the latest that have emanated from this court.

Chief Justice Burnam and Judge O'Rear dissented, and the following dissenting opinion was delivered by Judge O'Rear:

COURT OF APPEALS OF KENTUCKY.

April 22, 1904.

James B. Howard, - - - - - - - - - *Appellant*,

vs. Appeal from Franklin Circuit Court.

Commonwealth, - - - - - - - - - - *Appellee*.

DISSENTING OPINION BY JUDGE O'REAR.

I am unable to agree with the four members of the court who hold that the presence of the accused in a felony trial can be dispensed with, even by his consent, during the empaneling of the jury, or at any other stage of the trial. (Bill of Rights, Constitution, Sec. 11; Criminal Code, Sec. 183; Meece vs. Commonwealth, 78 Ky., 586; Rutherford vs. Commonwealth, 78 Ky., 642; Temple vs. Commonwealth, 14 Bush, 769; Allen vs. Commonwealth, 26 Ky., 642; Hopt vs. People of Utah, 110 U. S., 574.)

Nor can I agree that the evidence by Jones and Day of fragmentary conversations alleged to have occurred in Laurel County, between appellant and some other person, when it is conceded that the portions detailed are incomplete and disconnected from what went before or followed, is relevant as admissions by the accused. (Berry vs. Commonwealth, 10 Bush, 16; Terrel vs. Commonwealth, 13 Bush, 246.)

I concur with the majority of the court that the rejection of the communication between Youtsey and his wife was proper. (See printed record, pages 72–73.)

PETITION AND MOTION FOR REHEARING.

The petition and motion that were filed herein for a rehearing set up and rely on the following grounds, to wit:

Comes the appellant, James B. Howard, and moves the court to set aside the judgment of affirmance herein and to withdraw its opinion rendered on April 22, 1904, and grant him a rehearing herein, for the following reasons:

1. He says that said decision is in conflict with the Constitution of the United States, and also the State of Kentucky, as well as the statutes of said State applicable in said case.

2. That said decision is in conflict with and in derogation of the common law operative in this State.

3. He says that same is in violation of his rights under the Constitution of the United States, and especially under the Fourteenth Amendment thereof, because the ruling therein deprives him of his liberty without due process of law, and denies to him the equal protection of the laws.

4. He says that same is in violation of his rights as guaranteed him under the Fifth Amendment of the Constitution of the United States, because it deprives him of his liberty without due process of law.

5. He says that same is in violation of the Constitution of the United States, and in derogation of the common law, and more especially the Sixth Amendment of said Constitution, because, in the examination of said juror, J. C. Alexander, same was had by the court, on said challenge, in the absence of the defendant and counsel, and said Alexander discharged by the court over the objections of the defendant, after he had been accepted by both the Commonwealth and the defendant.

6. He says that Section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

> "SEC. 281. What not subject to exception. The decisions of the court upon challenges to the panel (a), and for cause (b), upon motions to set aside an indictment (c), and upon motions for a new trial (d), shall not be subject to exception."

is in conflict with the rights of the defendant under the Constitution of the United States, as well as the Constitution of Kentucky, and the common law obtaining in this State, and more especially in violation of Sections Five, Six and Fourteen Amendments of said Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in case of felony.

7. He says that the construction given by the court, in said opinion, of Section 281 is erroneous and prejudicial to his rights in this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the pres-

ence of the defendant, and not to challenges made or heard either in the absence of said defendant, or after the juror had been selected and accepted by both the Commonwealth and defendant, but he says that, in the event said section is construed by this court to apply to said state of case, then that same is in conflict with the Constitution of the United States and the common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

9. He says that, as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case, the court may have a discretionery power over said juror before he is sworn, but there is a limitation upon said discretion, and that he can not discharge him over the objection of the defendant simply because he has committed a contempt of court, as the court has the power to fine him or otherwise punish him for same, but not to deprive the defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark.

He says that all of said rulings complained of were and are prejudicial to his rights herein, and he herewith files, in support of this motion, a petition for a rehearing in this case, and he prays that same may be granted and that said opinion may be set aside or modified, and he asks for all other necessary and proper relief, the premises being considered." (See printed record, pages 74-75.)

Decision on Petition for Rehearing.

The decision and response by said court on the petition for rehearing, is as follows:

COURT OF APPEALS OF KENTUCKY.

June 15, 1904.

James B. Howard, - - - - - - - - - *Appellant*,

vs. Appeal from Franklin Circuit Court.

Commonwealth of Kentucky, - - - - - - *Appellee*.

RESPONSE TO PETITION FOR REHEARING BY JUDGE HOBSON.

The questions called to our attention in the petition for a rehearing under the Constitution of the United States were considered by the court on the original hearing, and we adhere to the conclusion there reached that no right of appellant under the Fifth, Sixth or Fourteenth Amendment to the Constitution of the United States has been violated.

The motion for rehearing is overruled.

(See printed record, page 78.)

ASSIGNMENT OF ERRORS.

The assignment of errors filed with said petition for a writ of error herein, is as follows:

COURT OF APPEALS OF THE STATE OF KENTUCKY.

James B. Howard, - - - - - - *Plaintiff in Error*,

vs. Assignment of Errors.

Commonwealth of Kentucky, - - *Defendant in Error*.

Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky, in the above-entitled matter, there is manifest error in this, to wit:

1. The court erred in holding that James B. Howard, on trial herein charged with a felony, could, together with his attorney, before the jury was sworn, but after one of said jurors had been tested and accepted by both the Commonwealth of Kentucky and said defendant, Howard, consent to the examination by the court, separate and apart from defendant Howard, and his attorney, of said juror who had been so accepted, against whom a complaint had been made, for the purpose of ascertaining whether or not he was qualified to retain his place as one of the jurors to try the case, and that said examination of said juror so had herein was not in conflict with or a violation of the Fourteenth (14th) Amendment of the Constitution of the United States of America or any clause thereof, and did not deprive plaintiff in error, James B. Howard, of his liberty without due process of law, or deprive him of the rights, privileges or immunities secured to him and other citizens of the United States and the State of Kentucky, and did not deny to him the equal protection of the law.

2. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the Fourteenth (14th) Amendment to the Constitution of the United States of America, and that it did not deny to plaintiff in error the equal protection of the law, or abridged his privileges and immunities secured to him by said amendment.

3. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, title, privileges or exemptions exercised under the Fourteenth Amendment to the Constitution of the United States of America.

4. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with or in derogation of the common law.

5. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with "the law of the land," and that it did not abridge the privileges and rights or immunities of said Howard, secured to him as a citizen of the United States and State of Kentucky, or deprived him of the equal protection of the law.

6. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was and is due process of law, and that it did not deprive said James B. Howard of his liberty without due process of law.

7. The court erred in holding herein that its said ruling, as set forth in assignment No. 1 herein, was not repugnant to or in conflict with the statute of the United States of America, and the authority exercised thereunder.

8. The court erred in holding that the record must affirmatively show that an injury resulted to the substantial rights of said James B. Howard by the dismissal, by the court, of J. C. Alexander from the panel of said jury after he had been tested and accepted by both the Commonwealth of Kentucky and said Howard, and in holding that said ruling did not deprive said Howard of the equal protection of the law.

9. The court erred in holding that its said ruling, as set forth in assignment No. 8, was due process of law, and that defendant was not thereby deprived of his liberty without due process of law.

10. The court erred in holding that it, the said court, was expressly forbidden, by reason of Section 281 of the Criminal Code of Practice of the State of Kentucky, from reversing said case for an error committed by the trial court, in dismissing said Alexander from said panel of the jury after he had been accepted by both the Commonwealth of Kentucky

and the defendant, James B. Howard, and in holding that said ruling did not abridge the privileges and immunities of said Howard as a citizen of the United States.

11. The court erred in holding that its said ruling, as set forth in assignment No. 10, herein, was, or is, due process of law, and that it did not deprive said Howard of his liberty without due process of law.

12. The court erred in holding that, by reason of Section 281 of the Criminal Code of Practice of the State of Kentucky, it, the said court, was without power to revise an error committed by the trial court, in the manner of the formation or selection of the trial jury, and in holding that said ruling did not abridge the rights, privileges and immunities of said plaintiff in error.

13. The court erred in holding that its said ruling, as set forth in assignment No. 12, herein, was due process of law, and in holding that it did not deprive said Howard of his liberty without due process of law, and that it did not deprive him of the rights, privileges and immunities secured to other citizens of the United States of America and the State of Kentucky.

14. The court erred in holding that Section 281 of the Criminal Code of Practice of the State of Kentucky, or the authority exercised thereunder, is not in conflict with, or a violation of, the Fourteenth (14th) Amendment of the Constitution of the United States, or any clause thereof, and that said section does not abridge the rights, privileges or immunities secured to plaintiff in error as a citizen of the United States of America, and State of Kentucky, and in holding that it does not deny him due process of law, and is not in conflict with the "law of the land."

15. The court erred in holding that the enactment by the State of Kentucky of said Section 281 of its Criminal

Code of Practice was not the making of a law that was in conflict with or a violation of the Fourteenth Amendment of the Constitution of the United States of America or any clause thereof, or the common law, and that it did not abridge the privileges or immunities of said Howard secured to him.

16. The court erred in holding that the authority exercised under said Section 281 of said Code, and the construction given said Section 281 by the courts of said State of Kentucky, and enforced herein, was not in conflict with or a violation of the Fourteenth Amendment to the Constitution of the United States of America or the common law, and that it did not abridge the rights, privileges and immunities of said Howard secured to him.

17. The court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not in conflict with or repugnant to the right secured to plaintiff in error herein, by the eleventh (11th) section of the "Bill of Rights," in the Constitution of the State of Kentucky, "to be heard by himself and counsel," and "to meet the witnesses face to face," and was not in conflict with or repugnant to "the law of the land" or the common law.

18. The court erred in holding that the enactment by the State of Kentucky of said Section 281 of its Criminal Code of Practice was not in conflict with or in derogation of "the law of the land."

19. The court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the Fifth (5th) Amendment to the Constitution of the United States of America, as depriving plaintiff in error of his liberty without due process of law.

20. The court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in

conflict with the Sixth Amendment to the Constitution of the United States of America, or the clause thereof giving, in criminal prosecutions, the accused the right to be heard by himself and counsel, and to be confronted with the witnesses against him.

21. That the court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the Fifth (5th) Amendment to the Constitution of the United States of America.

22. The court erred in holding herein that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the Sixth (6th) Amendment to the Constitution of the United States of America. (See printed record, pages 88 to 91.)

On July 23, 1904, James B. Howard, plaintiff in error, filed in the clerk's office of the Court of Appeals of Kentucky his petition for a writ of error herein, and his assignment of error (see printed record, pages 79 to 91), and entered a motion before the Chief Justice of said court for a writ of error, having given defendant in error, thirty (30) days' notice thereof, and thereupon said writ was duly allowed by said Chief Justice to operate as a supersedeas (see printed record, page 88), and was issued by the clerk of said court and returned to and filed in said clerk's office, together with a copy thereof for defendant.

A citation was issued thereon and returned to and filed in said clerk's office, duly accepted. (See printed record, pages 92-93.)

The order made and entered by the Chief Justice in granting and perfecting said writ, appears on pages 93-94 of

printed record, and it shows that the attorney general of the State of Kentucky, defendant in error, *was present and objected and excepted to said proceedings.*

Texas Pacific R. R. Co., vs. Kirk, 111 U. S., 436 (L. Ed., 28-481).

Miller vs. State of Texas, 153 U. S., 535 (L. Ed., 38-481).

Supreme Court, Rule 8.

U. S. Compiled Statutes, Section 1005.

Fearing afterwards that some complication might arise by reason the issual of the writ by the clerk of the Court of Appeals, on August 3, 1904, a writ was issued by the clerk of the United States Circuit Court (Sixth Circuit) for the Eastern District of Kentucky, at Frankfort, and citation duly issued thereon.

U. S. Compiled Statutes, Section 1003.

PROVISIONS OF THE CONSTITUTION AND STATUTES OF KENTUCKY CITED.

By Section 7 of the "Bill of Rights" in the present Constitution of the State of Kentucky it is provided:

> "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

By Section 11 of said "Bill of Rights" it is provided:

> "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information he shall have

a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions, for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

By Section 233 of the present Constitution of Kentucky it is provided:

"All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly."

By Sections 212 to 216, inclusive, of the Criminal Code of Practice of the State of Kentucky it is provided:

Sec. 12. "Challenges shall be tried and determined by the court in a summary manner, without the issues of law or fact arising thereon being reduced to writing, except when the court disallows a challenge for implied bias.

Sec. 13. "The juror may be examined on oath by either party, upon the challenge."

Sec. 14. "Other witnesses may also be examined, and their attendance coerced."

Sec. 15. "The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins."

Sec. 16. "The challenges of either party need not be all taken at once, but separately, in the following order:

1. To the panel.
2. To the juror for general disqualification.
3. To the juror for implied bias.
4. To the juror for actual bias.
5. Peremptory."

By Section 183 of said Code it is provided:

"If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial."

By Section 250 of said Code it is provided:

"If, after a juror has been accepted, but before the jury has been completed, one of the accepted become so sick as to prevent the continuance of his duty, the court may excuse such juror, and complete the formation of the jury as if he had not been originally accepted."

And by Section 281 of said Code it is provided:

"The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

The Kentucky Statutes, Section 1149, provides:

"If any person be guilty of wilful murder, he shall be punished with death or confinement in the penitentiary for life, in the discretion of the jury."

Points of Law and Authorities.

I

A Federal question is seasonably presented, although made for the first time in the Appellate Court, in petition for a rehearing, provided said court passes upon same, and holds against the party invoking protection under the Constitution or laws of the United States.

AUTHORITIES RELIED UPON.

Mallett vs. North Carolina, 181 U. S., 592 (45-1017).
Leigh vs. Green, decided by Supreme Court, Feb. 23,

1904 (No. 119), found in April, 1904, Advance Sheets of "All Opinions of the United States Supreme Court."

U. S. Compiled Statutes, Section 1709.

Green Bay & M. Canal Co. vs. Patten Paper Co., 172 U. S., 58 (43 L. Ed., 364; 19 Sup. Ct. Rep., 97).

Powell vs. Brunswick County Supers., 150 U. S., 433 (37 L. Ed., 1134; 14 Sup. Ct. Rep., 166).

O'Neil vs. Vermont, 144 U. S., 359 (36 L. Ed., 465; 12 Sup. Ct. Rep., 693).

II.

"COMMON LAW.

A State can repeal any common law offense, or change the modes of criminal procedure, *so long as said change does not violate any absolute and fundamental right of the accused;* as to the question here involved, the State of Kentucky has adopted the common law, without modification or change, and the provision of the Fourteenth Amendment to the Constitution of the United States protects the fundamental rights thereby created and recognized.

AUTHORITIES RELIED UPON.

Section 233 of the present Constitution of the State of Kentucky.

Ray vs. Sweeney, 77 Ky. (14 Bush), p. 9.

Chisholm vs. Georgia, 2 Dallas, 419 (1 L. Ed., 447).

Holden vs. Hardy, 169 U. S., 366 (42 L. Ed., 780).

III.

"DUE PROCESS OF LAW."

The provision of the Fourteenth Amendment to the Constitution of the United States, that "no State shall deprive

any person of life, liberty or property without due process of law," having brought within the Federal jurisdiction and power the protection against State action, the judicial power of the nation necessarily extends thereto; and it is not requisite for jurisdiction that the right or thing claimed come from the law of the United States; though it comes from the State law, it is protected from unlawful State action. It must not be so construed, however, as to interfere with the State in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceeding, so long as said law, as enforced by the State, affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty and property.

AUTHORITIES RELIED UPON.

Fourteenth Amendment of the Constitution of the United States.

Section 11 of the Bill of Rights in the Constitution of the State of Kentucky.

Davidson vs. New Orleans, 96 U. S., 99 (24–616).
Fifth Amendment to the Constitution of the U. S.
Holden vs. Hardy, 169 U. S., 366 (42–780).
Lowe vs. Kansas, 163 U. S., 85.
Civil Rights Cases, 109 U. S., 11 (27–835).
U. S. vs. Cruikshank et al., 92 U. S., 554 (23–588).
U. S. vs. Harris, 106 U. S., 629 (27–294).
Caldwell vs. State of Texas, 137 U. S., 699 (34–818).
Allen vs. State of Georgia, 166 U. S., 137 (41–949).
Brown vs. New Jersey, 175 U. S., 174 (44 L. Ed., 120).
Maxwell vs. Dow, 176 U. S., 582 (44 L. Ed., 597).
Hurtado vs. California, 110 U. S., 516 (28–232).
Thompson vs. Utah, 170 U. S., 344 (42–1062).
Ex Parte Ulrich, 42 Fed. Rep., 591, 592, 593.

IV.

"FUNDAMENTAL RIGHTS."

PRESENCE OF THE ACCUSED DURING TRIAL NOT ONLY A RIGHT, BUT A NECESSITY.

By the "Common Law," which has been adopted by the State of Kentucky, and by the Constitution and statutes, and the decisions of the courts of said State, in the trial of a case, when the life or liberty of the accused is in peril, he not only has the right to be present, *but must be present during the whole of the trial*, at every step when anything material to his interest is done in his case, from the arraignment to the sentence.

His presence is not only an inalienable right, but a *jurisdictional fact and can not be waived.*

It is the duty of the trial court to see that this right is not violated, otherwise Federal jurisdiction under the Fourteenth Amendment will attach to protect said right.

AUTHORITIES RELIED UPON.

Story on Constitution, Vol. 2, Sec. 1791.
Hale's Pleas of the Crown, page 33.
Bacon's Abridgement, Vol. 3, page 512.
Magna Charta, Chapter 29.
Brannon on "The Fourteenth Amendment," page 271.
Cooley's Constitutional Limitations, 7th Ed., page 452.
Underhill on Criminal Evidence, page 284, Sec. 232.
Wharton's Criminal Pleading and Practice, 8th Ed., Sec. 540.
Schwab vs. Berggren, 143 U. S., 442 (36-218).
Lewis vs. U. S., 146 U. S., 370 (36-1012).
Hopt vs. the People of Utah, 110 U. S., 574 (28-265).
Criminal Code of Utah, Sec. 218.
Criminal Code of Practice (Kentucky), Sec. 183.
Kentucky Code, Sec. 212-216.
State vs. Carmen, 63 Iowa, 130 (50th American Rept., 741; 18 N. W. 691).

Bishop's New Criminal Procedure, Sec. 271.
Bishop's New Criminal Procedure, Sec. 269.
Dougherty vs. Commonwealth, 69th Pa. State Reports, 290.
Wharton's Criminal Pleading and Practice, Sec. 545, 8th Ed.
Prine vs. Commonwealth, 18th Pa., 103.
Rolls vs. State, 52 Miss. Reports, 396.
State (Mo.) vs. Smith, 90 Mo., 37 (59th American Reports, 4).
French vs. State (Wisconsin), 21 Lawyers' Reports, Annotated, 405.
Anderson vs. State, 2 Sneed (Tenn.).
Witt vs. State, 5 Coldwell's Reports (Tenn.) 11.
Gladden vs. State of Florida, 12 Fla. Reports, 577.
Maurer vs. People, 43 N. Y., page 1.
Hill vs. People, 16th Mich., 351.
Schick vs. U. S., July 15, 1904, Advance Sheets of the Opinions of the Supreme Court of the United States, page 826.
West vs. Louisiana, decided May 2, 1904 (June 1, 1904, Advance Sheets, page 650).
Constitution of Kentucky, Sec. 233.
Criminal Code of Practice, Sec. 183.
Temple vs. Commonwealth, 77 Ky. (14 Bush), 769.
Allen vs. Commonwealth, 86 Ky., 642.
Hite vs. Commonwealth, 14 Ky. Law Rep., 308.
Meece vs. Commonwealth, 78 Ky., 586.
Criminal Code, Sec. 340.
Rutherford vs. Commonwealth, 78 Ky., 640.
Crowley vs. U. S., July 1, 1904, No. Advance Sheets of the Supreme Court Opinions, decided May 31, 1904.
Rogers vs. State of Alabama, decided Jan. 18, 1904 (No. 407), Feb. 15, 1904, Advance Sheets of "All Opinions of the United States Supreme Court."
Criminal Code of Practice, Sec. 229.
Willis vs. Commonwealth, 86 Ky., 68.
Baltimore & Ohio R. R. Co. vs. Baugh, 149 U. S., 371 (37-774).
Chicago, Burlington & Quincy R. R. Co. vs. City of Chicago, 166 U. S., 235 (41-984).
Jacobi vs. Alabama, 187 U. S., 135 (47-107).
Johnson vs. Commonwealth, 72 Ky. (9 Bush), 225.

V.

When the absence of the accused during the trial is shown, the law presumes that his substantial rights have been prejudiced, and the holding of the Court of Appeals that the record must affirmatively show that said rights were not prejudiced, deprived the accused of his liberty without due process of law, and denied him the equal protection of the law.

AUTHORITIES RELIED UPON.

Meece vs. Commonwealth, 78 Ky., 586.
Rutherford vs. Commonwealth, 78 Ky., 640.
Allen vs. Commonwealth, 86 Ky., 642.
Crowley vs. U. S., July 1, 1904, No. Advance Sheets of the Supreme Court Opinions, decided May 31, 1904.

VI.

ABUSE OF DISCRETION IN DISCHARGING JUROR AFTER ACCEPTED.

That the court, in discharging Juror J. C. Alexander, after he had been accepted on the jury, without cause therefor, acted beyond its power, and that the Court of Appeals of Kentucky in holding that by reason of Section 281 of the Criminal Code, it could not reverse on account of said error, deprived the accused of his liberty without due process of law and denied to him the equal protection of the law.

AUTHORITIES RELIED UPON.

Klinger vs. State of Missouri, 80 U. S., 263 (20–635).
Criminal Code of Practice, Secs. 215–250–251–252–202–281.
Munday vs. Commonwealth, 81 Ky., page 233.
Wiggins vs. Commonwealth, 104 Ky., page 766.

Smith vs. Commonwealth, 20 Ky. Law Rep., 1848.
Colvin vs. Commonwealth, 22 Ky. Law Rep., 1408.
O'Brian vs. Commonwealth, 72 Ky. (9 Bush), 333.
Shelby vs. Commonwealth, 91 Ky., 566 (1891).

VII.

That the Court of Appeals of Kentucky, in holding that by reason of Section 281 of the Criminal Code of Practice of the State of Kentucky, it was without power to revise an error committed by the trial court, in the manner of the formation or selection of the trial jury, violated the Fourteenth Amendment of the Constitution of the United States of America, in that said holding deprived the accused of his liberty without due process of law, and denied to him the equal protection of the law.

AUTHORITIES RELIED UPON.

Criminal Code of Practice, Sections 190–194.
Kentucky Statutes, Section 2247.
Smith vs. Commonwealth, 20 Ky. Law Rep., 1848.
Yick Wo vs. Sheriff of the City and County of San Francisco, 118 U. S., 306 (30 L. Ed., 220).

Argument.

I.

FEDERAL QUESTION SEASONABLY PRESENTED.

A Federal question is seasonably presented, although made for the first time in the Appellate Court, in a petition for rehearing, provided said court passes upon same, and holds against the party invoking protection under the Constitution or laws of the United States.

The matters complained of as errors herein were objected and excepted to at the time made and entered in the trial court, *except the examination of the juror J. C. Alexander, made by the court separate and apart from plaintiff in error and his attorneys*, and all of said matters, *including the examination of Juror Alexander*, were briefed and argued on the original hearing in the Court of Appeals of Kentucky as *Federal questions*.

On the motion and petition for rehearing, all of said matters, *including the examination of Alexander*, were again presented *as Federal questions* (see printed record, pages 75–77), and the court filed a response to said petition, *passing upon said matters as Federal questions*. Said response appears on page 78 of the printed record, and is as follows:

"COURT OF APPEALS, KENTUCKY.

"June 15, 1904.

James B. Howard, - - - - - - - - - *Appellant*,

vs. Appeal from Franklin Circuit Court.

Commonwealth of Kentucky. - - - - - - *Appellee*.

RESPONSE TO PETITION FOR REHEARING, BY JUDGE HOBSON.

The questions called to our attention in the petition for rehearing, under the Constitution of the United States, were considered by the court on the original hearing, and we adhere to the conclusion there reached, that no right of appellant under the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States, has been violated.

The motion for rehearing is overruled.

It appears to be now well settled by this court that, although a question arising under the Constitution and law of the United States is presented for the first time in the

petition for a rehearing, if the court passes upon it, and decides same against the party invoking their protection, the Federal question will be held to have been seasonably presented.

In the case of Mallett vs. North Carolina, 181 U. S., 592 (45-1017), it is said:

"It is, of course, obvious that there was no opportunity for the defense to raise in the Criminal Court the question as to the validity, as against the defendants, of the legislation allowing an appeal to the Supreme Court, because that legislation was not enacted till after the trial had been concluded.

It would also seem that the question of the validity of that legislation, in its Federal aspect, was not raised or considered in the Superior Court. It is true that in that court error was alleged to the action of the Criminal Court in permitting evidence of certain statements in the books of the defendants, and which books had been seized by the sheriff under an attachment against the property of the defendants, to be used on the trial against the defendants and over their objection; and that contention was sustained by the Superior Court, and the new trial was granted for that and other reasons. But it does not appear that the Superior Court was formally called upon to consider any Federal question.

But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that Court considered and decided against the party invoking their protection.

It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion had been filed, but before it had been certified down, the defendant filed a petition for reargument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss

and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in a Supreme Court of a State after that court has pronounced its final decision. *Loeber vs. Schroeder*, 149 U. S., 580; 37 L. Ed., 856; 13 Sup. Ct. Rep., 934; *Sayward vs. Denny*, 158 U. S., 183; 39 L. Ed., 942; 15 Supt. Ct. Rep., 768; *Pim vs. St. Louis*, 165 U. S., 273; 41 L. Ed., 714; 17 Sup. Ct. Rep., 322.

But those are cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *State vs. Mallett*, 125 N. C., 718; 34 L. E., 651. Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action."

In Leigh vs. Green, decided by the Supreme Court, Feb. 23, 1904 (No. 119), found in the April, 1904, advance sheets of "All Opinions of the United States Supreme Court," it is said:

"A motion is made to dismiss because the claim of impairment of a right secured by the Fourteenth Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Be this as it may, the Supreme Court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is

reviewable here, although first presented in the motion for rehearing. *Mallett vs. North Carolina*, 181 U. S., 589; 45 L. Ed., 1015; 21 Sup. Ct. Rep., 730."

In the case at bar the court, in the response to the petition for rehearing, says that these Federal questions presented in the petition for rehearing "were considered by the court on the original hearing."

Section 709 of the U. S. Compiled Statutes, is as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

No particular form of words or phrases in which the claim of Federal rights must be asserted has ever been declared necessary. It is sufficient if it appears from the record that

such rights were specially set up or claimed in the State court in such a manner as to bring them to the attention of that court.

Green Bay & M. Canal Co. vs. Patten Paper Co., 172 U. S., 58; 43 L. Ed., 364; 19 Sup. Ct. Rep., 97.

If it appears from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the State court could not have given judgment without deciding it, that will be sufficient.

Powell vs. Brunswick County Supers., 150 U. S., 433; 37 L. Ed., 1134; 14 Sup. Ct. Rep., 166.

The court clearly having jurisdiction should see to it that the rights of a party to the protection of the Federal Constitution, brought to the attention of the State court, should not be ignored on any question of verbiage or insufficient statement.

O'Neil vs. Vermont, 144 U. S., 359; 36 L. Ed., 465; 12 Sup. Ct. Rep., 693.

II.

"COMMON LAW."

A State can repeal any common law offense or change the modes of criminal procedure, *so long as said change does not violate any absolute and fundamental right of the accused.* As to the question here involved, the State of Kentucky has adopted the common law, without modification or change, and the provisions of the Fourteenth Amendment to the Constitution of the United States protect the fundamental rights thereby created and recognized.

The contention on behalf of plaintiff in error herein is, that the customary laws, and ancient and settled usages and modes of proceeding existing in the common and statute law

of England, before the emigration of our ancestors, and which are shown not to have been of a local character, are still in force and binding upon the several States of the United States of America, in all prosecutions for felony, except where, by constitutional provision or legislative enactment of the State, same are forbidden, *or the modes of procedure* in the common law have been changed; but that, in no event can the State, through any of its instrumentalities, deny to any one accused of a felony the *absolute and fundamental rights and requirements* recognized by the "common law"; that such rights are the "residuum of natural liberty," and are protected by the Fourteenth Amendment to the Constitution of the United States of America, and especially by the "*due process of law*" clause thereof.

It is not contended that the State can not repeal any common law or statutory offenses, or that it can not enact different "*modes of procedure*," in criminal prosecutions, but only that, in so doing, *it can not violate the substantial or fundamental rights secured to an accused, when on trial, charged with a crime;* and that where no modification or change of the common law is made, it still remains in force.

The State of Kentucky has adopted "the common law" as part of its judicial system, without modification or change as to the question herein involved.

By Section 233 of the present Constitution of the State of Kentucky it is provided:

> "All laws which on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly."

And the courts of the State, in construing said section, in the case of Ray vs. Sweeney, 77 Ky. (14 Bush), page 9, said:

"By an act of the Virginia Convention of 1776, it was declared 'that the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James I., and which are of a general nature, and not local to that kingdom, * * * shall be the rule of decision, and shall be considered in full force until the same shall be altered by the legislative power of this colony.'"

"The present Constitution provides, and previous Constitutions in substance provided, that 'all laws which on the first day of June, 1792, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of the Commonwealth, shall be in force in this State until they shall be altered or repealed by the General Assembly.'

"The Revised Statutes repealed certain statutes of Virginia and of England, as do the General Statutes, but neither repeals the common law of England.

"It has been stated in argument in another case, if not in this, that between 1776 and 1792 the legislature of Virginia repealed the act of 1776, Section 6 of which we have already quoted, and that therefore the common law of England is not in force here by virtue of that act and of the provisions of our several Constitutions.

"No such statute as that by which the act of 1776 is supposed to have been repealed has ever been published among the laws in force in this State, and if any such existed it was unknown to this court in 1806, when, in deciding the case of Hunt vs. Warnicke, Hard., 62, it was held that the common law was in force here in virtue of the act of 1776, and although we do not know of any other case in which the existence here of the English common law is so distinctly recognized as in that case, yet there are very many cases the decisions in which are

based on its assumed existence, and of its existence in fact we entertain no doubt whatever.

"But only such principles and rules as constituted a part of the common law prior to the fourth year of the reign of James I are or ever were in force in this State. This is clearly implied in the act of 1776. To declare that the common law and statutes enacted prior to that time should be in force, was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here.

"James I ascended the throne of England in 1603, March 24, and the fourth year of his reign commenced March 24, 1607, and when it is sought to enforce in this State any rule of English common law as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date."

In Chisholm vs. Georgia, 2 Dallas, 419 (1 L. Ed., 447), after holding that there was no constitutional and statutory authority given in said case, it is said:

"The only principles of law, then, that can be regarded are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every State in the *Union*, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each State, *as it existed in England* (*unaltered by any statute*) *at the time of the first settlement of the country*. The statutes of *England* that are in force in *America* differ perhaps in all the States; and therefore it is probable the common law in each is in some respects different. But it is certain that, in regard to any common law principle which can influence the question before us, no alteration has been made by any statute which could occasion the least material difference, or have any partial effect."

In Holden vs. Hardy, 169 U. S., 366 (42 L. Ed., 780), it is said:

> "To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common law and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to the civil and political conditions, by having been enacted by them after the settlement of the country."

III.

"DUE PROCESS OF LAW."

The provision of the Fourteenth Amendment to the Constitution of the United States, that "no State shall deprive any person of life, liberty or property without due process of law," having brought within the Federal jurisdiction and power the protection against State action, the judicial power of the nation necessarily extends thereto; and it is not requisite for jurisdiction that the right or thing claimed come from the law of the United States; though it comes from the State law, it is protected from unlawful State action. It must not be so construed, however, as to interfere with the State in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceeding, so long as said law, as enforced by the State, affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty and property.

"Due process of law," as used in the Fourteenth Amendment of the Constitution of the United States, is synonymous with "the law of the land," which is used in Magna Charta, Chapter 29, wherein it is declared:

> "No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right."

And as used in Section 11 of the Bill of Rights in the Constitution of the State of Kentucky, which provided:

> "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. * * *"

The Fourteenth Amendment to the Constitution of the United States, operating *proprio vigore* upon the States, lays its prohibitions, in terms definite and exact, upon each of the Commonwealths of the Union. It not only reaches the State, as a community, in its force and effect, but, in its operation, it extends to every department—legislative, executive and judicial. The provisions of the constitutional article were used with reference to the condition and state of the citizen and the state of the law at the time of the adoption of the Constitution of the United States.

The prohibitory clause in the Federal Constitution that no State shall deprive any person of life, liberty, or property without due process of law, had a fixed, definite and ascertained meaning; and in the sense in which it was understood and applied by our ancestors, it was adopted as part of the fundamental law of this country.

Repeated adjudications of the Supreme Court of the United States, construing the Fourteenth Amendment, and interpreting its effect, all recognize that the expression "due process of law" is to be understood now as it was understood by our ancestors in their interpretation of the Magna Charta, and, in consequence of that construction, embrace those SUBSTANTIAL AND FUNDAMENTAL RIGHTS and requirements essential to the protection of the lives, liberties and property of American citizens.

In construing this article of the Constitution, Mr. Justice Miller, speaking for the court in Davidson vs. New Orleans, 96 U. S., 99 (24-616), said that it was to be interpreted and construed upon the lines of inclusion and exclusion. In other words, that it was for the judicial department of the Government to say, with due regard to the fundamental rights of the citizen, what was protected by the prohibition and therefore within its terms, and what rights were not affected, and therefore excluded from its operation; and that no exact and precise definition could be announced, but that each case must depend for its determination upon the primary inquiry whether the rights of the citizen sought to be affected were of that SUBSTANTIAL AND FUNDAMENTAL character which are SAFEGUARDED BY THE CANONS OF THE COMMON LAW as carried into the Fourteenth Amendment, guaranteeing to the citizens of the United States protection against the deprivation of life, liberty, or property, by the State or any of its agencies, without due process of law.

In this case it was held:

"It must be confessed, however, that the constitutional meaning or value of the phrase, 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the Constitutions of the several States and of the United States.

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant, by 'law of the land,' the ancient and customary laws of the English people, or laws enacted by the Parliament, of which these barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."

After reviewing the earlier jurisprudence, construing the Fifth Amendment to the Constitution, Mr. Justice Miller continued:

"But, apart from the imminent risk of a failure to give any definition which shall be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decision may be founded. This court is, after an experience of nearly a century, still engaged

in defining the obligations of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States."

In the case of Holden vs. Hardy, 169 U. S., 366 (42–780), there was in issue the construction of a local statute regarding labor and the hours of its employment, in which was involved the question of the police power of the State. An exemption from the effect and operation of the statute was urged under this provision of the Fourteenth Amendment; and while it was held that the particular statute in question was within the legitimate domain of State legislation, and unaffected by the Fourteenth Amendment, the learned justice who delivered the opinion carefully reviewed the jurisprudence of the Supreme Court construing the amendment, and, in the course of his opinion, announced:

"The Fourteenth Amendment, which was finally adopted July 28, 1868, largely expanded the power of the Federal courts and Congress, and for the first time authorized the former to declare invalid all laws and judicial decisions of the States abridging the rights of citizens or denying them the benefit of due process of law."

And in the same case, page 387, Mr. Justice Brown proceeded:

"This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in Hurtado vs. California, 110 U. S., 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent

inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land.

"We do not wish, however, to be understood as holding that this power is unlimited. While the people of each State may doubtless adopt such systems of law as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State.

"In addition, the Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws. * * *

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. What shall constitute due process of law, was perhaps as well stated by Mr. Justice Curtis in Murray's Lessees vs. Hoboken Land Co., 18 Howard, 272, 276, as anywhere. He said: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The Article is a restraint on the legislative as well as on the executive and judicial powers of government, and can not be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be

twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of the country.'"

Having next reviewed the opinion of Mr. Justice Miller, in Davidson vs. New Orleans, the learned justice added:

"Recognizing the difficulty in defining, with exactness, the phrase, 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, * * * and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

And it was determined by Mr. Justice Gray, in the case of Lowe vs. Kansas, 163 U. S., 85, that—

"Whether the mode of proceeding prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country, since it became a nation, in similar cases."

In the Civil Rights Cases, 109 U. S., page 11 (27–835), Mr. Justice Bradley, in delivering the opinion of the court, said:

"The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null and void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by the power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in the United States vs. Cruikshank, 92 U. S., 542;

Virginia vs. Rives, 100 U. S., 313, and Ex Parte Virginia, 100 U. S., 339."

On page 23, the learned justice continues:

"Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. * * * As we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

On page 13 of the same case it is declared:

"And so in the present case, until some State law has been passed, or through its officers or agents some State action has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authorities."

In United States vs. Cruikshank et al., 92 U. S., 554 (23-588), Chief Justice Waite said:

"The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson in Bank of Columbia vs. Okely, 4 Wheat., 244, it secures 'the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

The declared purpose of the Fourteenth Amendment was to protect the citizen in the enjoyment of his fundamental rights. That protection was already secured to him as against national legislation. It was intended by the Fourteenth Amendment to protect him against State action, and this, whenever those fundamental rights were sought to be disturbed, the effect of which would have been to deny to the citizen the due process of law. Now, if it is competent for the State, either by constitutional provision, statutory direction or judicial decision, at its pleasure, to deny to the citizen the enjoyment and protection of his fundamental rights, wherever life, liberty or property are involved, then the Fourteenth Amendment is of no avail, and, instead of securing protection, is an invitation to the State to evade its provisions.

Mr. Guthrie in his lectures upon the Fourteenth Amendment to the Constitution, discusses with recognized ability the historical origin and effective force of the words "due process of law" as used therein. He says:

> "The phrase 'due process of law' antedates the establishment of our institutions, and is endeared to our race by antiquity and the noblest historical associations. It embodies one of the broadest and most far-reaching guaranties of personal and property rights. Indeed, no words in our language signify more in respect of the rights and privileges of the individual than 'due process of law.'
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> "This pledge of individual rights and liberties is in the Constitution of the United States in a twofold sense; in the Fifth Amendment it is a limitation upon the powers of the national government; in the Fourteenth Amendment it is a limitation upon the powers of the States. Without venturing to attempt any specific definition, it may be said that the general scope of the provision requiring due process of law is to secure to every person, whether citizen or alien, those fundamental and inalienable rights of life, liberty and property which are inherent

in every man, and to protect all against the arbitrary exercise of governmental powers in violation and disregard of established principles of distributive justice. This protection is the object and essence of free government, and without it true liberty can not exist. * * *

"No statement of the general meaning of the phrases 'due process of law' and 'the law of the land' is more often quoted than that given by Mr. Webster in the Dartmouth College case. It defines the term in its relation to procedure as well as to substantive rights. Mr. Webster said: 'By "the law of the land" is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.'

"Judge Story's definition is succinct and accurate: 'Due process of law in each particular case means such an exertion of the powers of government as the *settled maxims of law permit and sanction*, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.'"

In United States against Harris, 106 U. S., page 629 (27-294), it is said:

"These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the Fourteenth Amendment.

"The language of the Amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty or property, without due process of law, nor denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as

enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

In Caldwell vs. State of Texas, 137 U. S., 699 (34–818), it is said, Mr. Chief Justice Fuller delivering the opinion of the court:

"By the Fourteenth Amendment, the powers of the States, when dealing with crime within their borders, are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Com., 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia vs. Okely*, 17 U. S., 4 Wheat, 235, 244 (4-559, 561). The power of the State must be exercised within the limits of these principles, and its exertion can not be sustained when special, partial and arbitrary. *Hurtado vs. California*, 110 U. S., 516, 535 (28-232, 238). No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the State courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to.

"The case before us is destitute of the elements of a Federal question, since there was nothing special, partial or arbitrary, or in violation of fundamental principles, in the law of the State, in accordance with which the indictment was found, and as applied in passing upon its sufficiency. The plaintiff in error was not denied the equal protection of the laws, nor deprived of the process due by the law of the land. The Constitution of Texas secured

to him the right to demand the nature and cause of the accusation against him, and the State court determined, as was its province, that this demand was satisfied by the indictment in question. His objections were, in effect, to the technical sufficiency of the indictment, but not that his rights had been determined by any other rules than those applied to the rest of the community, nor that the court had done more than commit errors in the disposition of a subject within its jurisdiction."

The case of Allen vs. State of Georgia is a writ of error to the Supreme Court of the State of Georgia.

After Allen had sued out a writ of error to the Supreme Court of Georgia, and pending same, he escaped, and the writ was dismissed.

He had been convicted of murder, and was afterward captured. He now claims that the dismissal of said writ deprives him of due process of law.

In this case this court said:

"To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In the case of Brown vs. New Jersey, 175 U. S., 174 (44 L. Ed., 120), a conviction of murder was had. Defendant claims that he was deprived of due process by reason of the

jury being what is known as a "struck jury." The court in this case first held that the statutory provision for a "struck jury" was not in conflict with the Constitution of said State; that this question, however, was one to be determined by the highest courts of said State, and that the courts of the State had so determined, citing a number of State authorities in support of same.

In this case the court says:

> "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. *Ex Parte Reggel*, 114 U. S., 642; 29 L. Ed., 250; 5 Sup. Ct. Rep., 1148. *Iowa C. R. Co. vs. Iowa*, 160 U. S., 389; 40 L. Ed., 467; 16 Sup. Ct. Rep., 344. *Chicago, B. & Q. R. Co. vs. Chicago*, 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its modes of judicial proceeding. *Missouri vs. Lewis*, 101 U. S., 22, 31; 25 L. Ed., 989, 992.
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> "The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

Maxwell vs. Dow, 176 U. S., 582 (44 L. Ed., 507), is a writ of error to the Supreme Court of the State of Utah to review a decision deciding a writ of habeas corpus on the grounds of the unconstitutionality of a State statute allowing

prosecution by *information*, and a trial thereon by a jury composed of only *eight*.

Maxwell was charged with the crime of robbery. This court affirmed the judgment of the Supreme Court of Utah.

In his petition Maxwell especially set up and claimed (1) that—

> "To prosecute him by information abridged his privileges and immunities as a citizen of the United States under Article 5 of the Amendments to the Constitution of the United States, and also violated Section 1, Article 14, of those Amendments; (2) that a trial by a jury of only eight persons abridges his privileges and immunities as a citizen of the United States under Section 6, and also violated Section 1 of Article 14 of said Amendments; (3) that a trial by such a jury and his subsequent imprisonment by reason of the verdict of the jury deprived him of his liberty without due process of law, in violation of Section 1 of Article 14, which provides that no State shall deprive any person of life, liberty or property without due process of law."

This court held that the objection that the proceeding by *information* does not amount to due process of law has been heretofore overruled, and must now be regarded as settled by the case of Hurtado vs. California 110 U. S., 516; that there are certain privileges and immunities possessed by a citizen of the United States, because of his citizenship, that can not be abridged by any action of the State; that the first ten amendments were intended as restraints and limitations upon the general government and were not intended to, and did not, have any effect upon the powers of the respective States; that there was a citizenship of the United States and a citizenship of the State, which were distinct from each other, and that it was only privileges and immunities of the citizens of the United States that was placed by the Fourteenth Amend-

ment under the protection of the Federal Constitution; and that the privileges and immunities of a citizen of a State, wherever they might be, were not intended to have any additional protection by the *paragraph in question;* that the privileges and immunities claimed by plaintiff in error were not such as belong to citizens of the United States and placed by said Amendment under the protection of the Federal Constitution.

This holding of the court herein only related to the particular clause of the amendment in question, that is, *the privileges and immunities of citizens of the United States, as in the decision it is said:*

> "The principle to be deduced from these various cases is that the rights claimed by the plaintiff in error rest with the State government, and are not protected by the particular clause of the amendment under discussion. *What protection may be afforded the individual against State legislation, or the procedure in State courts or tribunals, under other clauses of the amendment, we do not now inquire, as what has been heretofore said is restricted to the particular clause of that amendment which is now spoken of, the privileges or immunities of citizens of the United States.*"

In the case of Hurtado vs. The People of California, 110 U. S., 516 (28–232), it appears that the Constitution of said State provided that one accused of crime, after examination and commitment by a magistrate, may be prosecuted by information.

Hurtado was prosecuted by information for the crime of murder, convicted and sentenced to death, and the Supreme Court of the State affirmed said sentence. The error complained of is the prosecution by *information*, instead of *indictment*, and that same is repugnant to the Fourteenth Amendment of the Constitution of the United States.

"This proceeding, as (it) is regulated by the Constitution and laws of this State, is not opposed to any of the definitions given of the phrases, 'due process of law,' and 'the law of the land'; but, on the contrary, it is a proceeding strictly within such definitions, as much so in every respect as is a proceeding by indictment. It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law. * * *

"Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and, if the people of the State find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our State Constitution and nothing in the Fourteenth Amendment to the Constitution of the United States which prevents them from doing so.

"On the other hand, it is maintained on behalf of the plaintiff in error that the phrase 'due process of law' is equivalent to 'law of the land,' as found in the 29th chapter of *Magna Charta;* that, by immemorial usage, it has acquired a fixed, definite and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed

and destroyed by prosecutions founded only upon private malice or popular fury.

"This view is certainly supported by the authority of the great name of *Chief Justice Shaw* and of the court in which he presided, which, in *Jones vs. Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of *Magna Charta* in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said:

"'The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty. * * * It having been stated,' he continued, 'by *Lord Coke*, that by the "law of the land" was intended a due course of proceeding according to the established rules and practice of the courts of common law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by information of various kinds, by the officers of the crown in the name of the king. But, in reply to this, it may be said that *Lord Coke* himself explains his own meaning by saying, "'the law of the land,' as expressed in *Magna Charta*, was intended due process of law, that is, by indictment and presentment of good and lawful men." And further, it is stated, on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com., 310.' Referring again to the passage from *Lord Coke*, he says, p. 343. 'This may not be conclusive, but, being a construction adopted by a writer of high authority before the emigration of our ancestors, it has a tendency to show how it was then understood.'

"This passage from Coke seems to be the chief foundation of the opinion for which it is cited; but a critical

examination and comparison of the text and context will show that it has been misunderstood, that it was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used. * * *

"And the conclusion rightly deduced is, as stated by Mr. Cooley, Const. Lim., 356: 'The principles, then, upon which the process is based, are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.'

"It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray vs. Land I. Co.*, 18 How., 272 (59 U. S., XV., 372). There, *Mr. Justice Curtis*, delivering the opinion of the court, after showing, p. 276 (374), that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows: 'To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process, to which the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and mode of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

"This, it is argued, furnishes an indispensable test of what constitutes 'due process of law'; that any proceeding, otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, can not be regarded as due process of law.

"But this inference is unwarranted. The real syllabus

of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. * * *

"In this country, written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of *Magna Charta* were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that, as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property. * * *

"The Supreme Court of Mississippi, in a well considered case, *Brown vs. Comrs.*, 50 Miss., 468, speaking of the meaning of the phrase, 'due process of law,' says: 'The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.' * * *"

This case (Hurtado) has been quoted from at length in order to call attention particularly to the fact, which clearly

appears by reference to said decision, that is, that the conclusion finally reached therein rests upon the grounds that:

1. Under "the common law," the institution and trial of prosecutions for crime did not necessarily have to be in the form of an indictment, but were allowable and were frequently had under process of information.

2. That the question of indictment or information related entirely to form or mode of procedure, and not to substance, and therefore did not impair or deny to the accused any substantial or fundamental right, as the proceeding under each form of prosecution was the same.

Thompson vs. Utah, 170 U. S., 344 (42-1062), is a prosecution for grand larceny. The crime is alleged to have been committed when Utah was a Territory; then a jury of twelve was required. When said Territory was admitted as a State only eight jurors were required, and, *without objection*, eight composed the jury that convicted Thompson.

This court held that the law making said change was an *ex post facto* law.

In this case Mr. Justice Harlan said:

> "Cooley, in his 'Treatise on Constitutional Limitations,' after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be concluded only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in so doing, dispense with any of those substantial protections with

which the existing law surrounds the person accused of crime.' Chap. 9, 272.

"And this view was substantially approved by this court in Kring vs. Missouri, above cited. So in Hopt vs. Utah, 110 U. S., 574, 590 (2-262, 269), it is said that no one had a vested right in mere modes of procedure, and that it was for the State, upon grounds of public policy, to regulate procedure at its pleasure. This court, in Duncan vs. Missouri, 152 U. S., 378, 382 (38-485, 487), said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in Hopt vs. Utah, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates, would be *ex post facto* in its nature and operation, and that legislation of that kind can not be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes, by their operation, take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him. * * *

"It is said that the accused did not object until after verdict to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

"In the case of Hopt vs. Utah, above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors

was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence. The court said: "We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal appearance at the trial."

In Ex Parte Ulrich, 42 Federal Reporter, 591, 592, 593, it is said:

"As expressive of how deeply rooted this principle of the common law has ever been in the minds and convictions of the American people, as their common, inestimable heritage of liberty from the institutions and usages of the mother country, the colonists, long before the adoption of the Constitution, incorporated the provision respecting due process of law, or the law of the land, in all their local governments; and there has not been a Constitution, State or Federal, adopted on this continent, which does contain the provision against double trials and punishments, or punishment after acquittal. It is imbedded in the very bone-work of our political and judicial system. Compelled, as the learned counsel for the State is, to admit this historic truth, he ingeniously sought on the argument of this cause to maintain the proposition that the term 'due process of law,' as employed in the Fourteenth Amendment, was not designed by its framers to extend to and embrace the instance of a double jeopardy in a criminal prosecution, for the reason that the same provision found in the Fourteenth Amendment also appears in the Fifth Amendment, in which is the clause prohibiting the placing of the citizen in jeopardy twice for the same offense; and he relies upon the statement of Mr. Justice Matthews in Hurtado vs. California, 110 U. S., 534 *et seq.*, 4 Sup. Ct. Rep., 111, 292, to the effect that the term 'due process of law' is employed in the Fourteenth Amendment in no different sense from that in the Fifth Amendment, and that, if 'it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declaration to that effect.' The contention of counsel is

that, by parity of reason, inasmuch as the Fifth Amendment contained also an express provision against again vexing the citizen with prosecution after having once been in jeopardy, it would have been superfluous and repetitious to cover the same right under the clause respecting due process of law. It must be confessed that some expressions of the learned justice in this connection give color to such inference. But a closer examination of the context, as well as the whole debate on the question involved in that case, can leave little doubt that such first impression is quite superficial. A brief review of the California case, we think, will make this clear. The Constitution of the case of California authorized the prosecution of persons on information. Hurtado was accordingly, on information, prosecuted and convicted of the crime of murder. He applied to the Supreme Court of the United States to review the judgment of the State court, on the ground that the trial and conviction was not due process of law within the meaning of the Fourteenth Amendment. The argument of Mr. Justice Matthews, who wrote the majority opinion of the court, was to show that the presentment or indictment of a grand jury in cases of felony was not so established and fixed in the common law of England, as it existed at the time of the adoption of the Federal Constitution, that it could be regarded as a part of the law of the land, within the meaning of 'due process of law.' The opinion reviews the history of *Magna Charta*, and the comments thereon by Coke and other English authorities and judges, to show that presentment and indictment were not a part of the law of the land as secured by *Magna Charta*, and interwoven by usage in the practice of the courts of common-law jurisdiction, and for that reason, although the Fifth Amendment provides that no person could be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, it was not included within the terms of 'due process of law,' as employed in the Constitution, as due process of law is process according to the law of the land as it existed by immemorial usage in England, and was transplanted by the colonists on this continent as a part of our heritage of liberty. * * *

"The opinion then proceeds to show that, by the term 'due process of law,' it was the design of the amendments to irrevocably secure the citizen or community against 'arbitrary power enforcing its edicts to the injury of the persons and property of its subjects,' as 'essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions.' The opinion then quotes with approbation the language of the Supreme Court of Mississippi in *Brown vs. Levee Commissioners*, 50 Miss., 468:

"'The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned by the loss of life, liberty or property, then the deprivation has not been by "due process of law."'

"The opinion then, in express recognition of the true import of due process of law, concludes by saying that that proceeding is due process of law 'which regards and preserves those principles of liberty and justice' which have come to us from immemorial usage as safeguards of personal liberty. If the contention of the State here be correct, that Mr. Justice Matthews intended to assert the proposition that a second prosecution for the same offense after acquittal or that the right of presentment by grand jury are not included within the term 'due process of law,' simply for the reason that in the Fifth Amendment these rights were expressly protected, and that nothing else named in said Amendment, therefore, could be regarded as coming within the protecting arms of the guaranty of due process of law, it would have been sufficient to have merely so asserted, and that would have ended the case. On the contrary, the elaboration of the proposition that the presentment by indictment could not be regarded as the law of the land within the meaning of *Magna Charta*, and usage in the common-law courts, and for that reason did not come within the meaning of 'due process of law,' extending over seventeen or eighteen pages of the reported case, leaves no room for doubt that,

in the mind of the Supreme Court, had the right in question been part of the law of the land as hereinbefore defined, the appeal of Hurtado would have been well taken under the Fourteenth Amendment."

In "The Fourteenth Amendment," by Brannon, p. 403, in speaking of the Fourteenth Amendment, it is said:

"It is not requisite for jurisdiction that the right or thing claimed come from the law of the United States; though it come from State law, it is protected against unlawful State action. There is a Federal question, if it be such a right, and is so adversely acted upon by State authority. The original Constitution gives the Federal courts jurisdiction in all cases in law and equity 'arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority. And the Fourteenth Amendment having brought within the Federal jurisdiction and power the protection against State action except by due process of law, of life, liberty, property and equality before the law, the judicial power of the nation necessarily extends thereto.'"

The Fourteenth Amendment to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The first part of said amendment speaks of a citizenship of the *United States*, and also of a citizenship of the *State*, and then provides that no State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of *the United States*. The privileges and immunities of citizens of *the State* are not protected by said amendment.

The second part of said amendment, however, does not make the right of protection thereunder depend upon citizenship, but prohibits the State from depriving *any person* of life, liberty or property, without due process of law, or to deny to any person within its jurisdiction the equal protection of the law.

This "due process" and "equal protection of the law" that the State is required by said amendment to extend to *all* persons within its jurisdiction, is not intended to be so construed as to interfere with the State in its administration of the criminal law, nor to confine it to any special mode of proceedings in the enforcement of the same, *unless said proceedings adopted are subversive of the fundamental rights of the individual.*

The first ten amendments are restraints and limitation upon the powers of the general government. The Fourteenth Amendment creates no new right, but is merely prohibitory, corrective in its nature, forbidding, rather than commanding, certain acts upon the part of the State and its agencies.

The only limitations placed upon the State are, that it must see to it that equal protection is afforded to all persons within its jurisdiction, similarly situated, and that it does not make or so administer the law as to abridge or to deny to any person the fundamental and inalienable rights that are so essential to the protection of life, liberty and property.

These rights are not matters of form, but substance, and to determine them it is not necessary in all cases, if in any, to be able to point out a constitutional provision or legislative enactment therefor. These may be declaratory of, but

never create them; their recognition is necessary in the just administration of the law of all civilized countries; they are of the common law, a part of our jurisprudence, and are protected by the Fourteenth Amendment.

The right of the accused to be heard by himself and counsel, to be present during the whole trial, including the empaneling of the jury, is a FUNDAMENTAL RIGHT.

IV.

"FUNDAMENTAL RIGHT."

PRESENCE OF ACCUSED DURING TRIAL NOT ONLY A RIGHT BUT A NECESSITY.

By the "common law," which has been adopted by the State of Kentucky, and by the Constitution and statutes and the decisions of the courts of said State, in the trial of a case, when the life or liberty of the accused is in peril, he not only has the right to be present, *but must be present during the whole of the trial*, at every step when anything material to his interest is done in his case, from the arraignment to the sentence.

His presence is not only an inalienable right, but a *jurisdictional fact, and can not be waived.*

It is the duty of the trial court to see that this right is not violated—otherwise Federal jurisdiction under the Fourteenth Amendment will attach to protect said right.

In this case at bar, eleven jurors had been tested and accepted by both the Commonwealth and the defendant, and were in the jury box waiting to be sworn when the panel was completed, when the Commonwealth's attorney came into court, and, in the presence of the accused and his counsel, stated that he had a matter that he desired to bring to the atten-

tion of the court, *away from the presence of the jury*, and thereupon the court and counsel for the Commonwealth and defendant and his counsel retired to the county judge's office, and the attorney filed the affidavit of Ben Hackett, and, for reasons therein stated, moved the court to discharge juror J. C. Alexander, who was one of the eleven jurors accepted, to which defendant by counsel objected.

The reasons stated in the affidavit of said Hackett were two:

1. "This affiant, Ben Hackett, says that after the killing of William Goebel he and Mr. J. C. Alexander, who had been accepted on the jury to try said case, had many conversations and arguments about the said killing, *this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel among those charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him.*" (Italics are ours.)

2. "This affiant further says that on yesterday afternoon, late, after Mr. Alexander had been accepted as a juror to try the case, and *after the affiant had been excused* (italics are ours), after those accepted as jurors had been charged and admonished by the court, and immediately after the adjournment for supper, and as the jury was being conducted by the sheriff away from the courthouse, affiant by accident met the jury as they were passing through the courthouse yard, when, in passing, Mr. Alexander said to this affiant: 'Hello, Ben! I am glad that they cut you off this jury, as I did not want to serve on this jury with you.'" (Printed record, pages 32-33.)

Said Hackett had been summoned and called *and had qualified himself in said case as a juror*, and thereupon the defendant, by counsel, challenged him for cause, and the court overruled the challenge, and then defendant challenged him *peremptorily*, and the court stood him aside.

Argument was heard on both sides on said motion to discharge juror J. C. Alexander, and—

"It was agreed *by counsel* on either side that the court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, *that he said to said Hackett while in the custody of the sheriff, 'hello, Ben, I am glad they cut you off this jury, as I did not want to serve on this jury with you'* (italics are ours), and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that *such conduct* on the part of Alexander was a violation of the admonition of the court *when he was placed in the custody of the sheriff*, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged, and this court, being *thus advised* (italics are ours), overruled defendant's objection, and discharged and excused said Alexander, and defendant, by counsel, excepts. Thereupon, defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court, being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant, by counsel, excepts." (Printed record, pages 32–33.)

It thus clearly appears that the court, in acting upon the motion to discharge Alexander, *did not inquire into or consider the "First Reason,"* stated in said Hackett's affidavit, and why it was not considered is too apparent to require comment.

The record shows that the "*agreement*" referred to, was made "BY COUNSEL ON EITHER SIDE"; as a matter of fact, however, the accused was present when it was so made.

The question here presented is not one in regard to a question of evidence, *but the right of the accused to be*

present during the trial; the right to be heard by himself and counsel.

Mr. Justice Story, in his work on the Constitution, Volume 2, Section 1791, in dealing with the fundamental rights of an accused charged with the commission of a crime, enumerates among other rights substantial and fundamental, and protected by the Bill of Rights and the Constitution, the right to be confronted with the witnesses produced against him, and declares that, in this, the organic law of the nation does but follow the established course of the common law in all trials for crime. That learned jurist said:

> "The other article, in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crime. The trial is always public; the witnesses are sworn, and give in their testimony (at least in capital cases) in the presence of the accused; the nature and cause of the accusations are accurately laid down in the indictment; and the trial is at once speedy, impartial, and in the district of the offense."

Lord Chief Justice Hale, in his "Pleas of the Crown," page 33, says:

> "Yet the law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge."

It is said in Bacon's "Abridgment," Vol. 3, page 512, under the title "Evidence," that—

"The examination of witnesses *viva voce* in open court is justly esteemed one of the greatest excellencies of our law, not only from the awe and reverence which the solemnity of the manner is supposed to produce in the witness, and the regard which from thence he must have for truth, but also from the benefit of cross-examining; and, further, the air and manner of giving evidence often carry such convictions with them as will induce the court and jury to believe or reject what the witness has sworn. Hence it hath always been held as a settled rule that in case of life no evidence is to be given against the prisoner but in his presence."

In Magna Charta, Chapter 29, it is solemnly declared:

"No freeman shall be taken or imprisoned or be disseized of his freehold or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers or BY THE LAW OF THE LAND. We will sell to no man, we will not deny or defer to any man, either justice or right."

Of this charter Lord Coke says:

"It is but declaratory of the old law, *per legale judicium parium suorum vel per legem terrae.*"

and then, commenting on the words, *per legale judicium*, he adds:

"By the word, *legale* amongst others, three things are implied: 1. That this manner of trial was by law before this statute. 2. That their verdict must be legally given, wherein principally it is to be observed—first, that the lords ought to hear no evidence but in the presence and hearing of the prisoner; secondly, after the lords be gone together to consider of the evidence, they can not send to the high steward to ask the judges any question of law but in the hearing of the prisoner, that he may hear whether the case be rightly put, for *de facto jus*

oritur; neither can the lords, when they are gone together, send for one of the judges to know any opinion of law; but the high steward ought to demand it in court, in the hearing of the prisoner. 3. When all the evidence is given by the king's learned counsel, the high steward can not collect the evidence against the prisoner, or in any sort confer with the lords touching their evidence in the absence of the prisoner, but he ought to be called to it; and all that is implied in this word *legale*." Lord Coke's Second Inst., 48-49.

Judge Brannon in his work, "The Fourteenth Amendment," page 271, says:

"Principles of the common law, and most of the Constitutions and statutes, imperatively require, as an initial step, before any further one in the process of conviction of felony, that the accused shall be personally present to answer the indictment. He can not do so by counsel. He must be so present at every step when anything material to his interests is done in his case, down to and including final judgment."

In Cooley's "Constitutional Limitations," Seventh Edition, page 452, it is said:

"In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment. But misdemeanors may be tried in the absence of the accused."

In Underhill on "Criminal Evidence," page 284, Section 232, it is said:

"In order that a verdict of guilty of a felony shall stand, it is absolutely necessary that the examination of witnesses shall take place only during the actual presence of the accused in the court room. He must be present

when the witness is sworn, and an error in receiving evidence in his absence is not cured by the repetition of the questions and answers on his return. Whether the prisoner was prejudiced by the testimony given in his absence, is immaterial. Though the court has excluded the evidence which he did not hear, or has caused it to be repeated in his presence, still he has been deprived of his right to see the witness, and to watch and observe his every look, gesture and motion. The court must see that the prisoner is present, and must allow nothing to be done in his absence. As soon as his absence is noticed the trial should be arrested or continued."

In Wharton's "Criminal Pleading and Practice," Eighth Edition, Section 540, it is said:

"In trials for cases in which corporal punishment is assigned the defendant's appearance must ordinarily be in person, and must so appear on record. There can be no judgment of conviction taken by default. Nor does the necessity for the defendant's presence cease with the opening of the case. Absence on his part during the trial, unless the absence be necessary and temporary, will be ground for a new trial; and the fact that the presence does not appear on record is ground for writ of error."

In the case of Michael Schwab vs. A. W. Berggren, 143 U. S., 442 (36-218), it is said:

"The personal presence of the accused, from the beginning to the end of the trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and can not be dispensed with. This court, in *Hopt vs. Utah*, 110 U. S., 574-579 (28, 262-265), after observing that the public has an interest in the life and liberty of the accused, and that neither can be lawfully taken except in the mode prescribed by law, said: 'That which the law makes essential in proceedings involving deprivation of life or liberty can not be dispensed with or effected by the consent

of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com., 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial—that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without the due process of law required by the Constitution.' *Harris vs. People*, 130 Ill., 457-459. But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court, whose only function is to determine whether, in the transcript submitted to them, there appear any error of law to the prejudice of the accused; especially where, as in this case, he had counsel to represent him in the court of review. We do not mean to say that the appellate court may not, under some circumstances, require his personal presence; but only, that his presence is not essential to its jurisdiction to proceed with the case."

In Lewis vs. The United States, 146 U. S., 370 (36-1012), it is said:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. 'It would be contrary to the dictates of humanity to let him waive the advantages which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence.'

Prine vs. Com., 18 Pa., 103, per Gibson, *Ch. J.* And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact."

The case of Hopt vs. The People of Utah, 110 U. S., 574 (28-265), is one wherein the charge was murder, and a conviction had, and sentence of death pronounced.

The validity of the judgment is questioned upon the grounds that a part of the proceedings in the trial court were conducted in the absence of the accused.

The Criminal Code of Utah, Section 218, provided:

"If the indictment is for a felony, the defendant must be personally present at the trial. * * *"

By said code challenges were allowed either party for bias, such challenges, if the facts be denied, to be tried by three impartial triers appointed by the court. Said jurors challenged may be examined *as witnesses* to prove or disprove the challenge; other witnesses may be examined on either side for the same purpose; when said examination is concluded the court must instruct the triers as to their duty.

Six jurors were challenged by defendant; the grounds were denied by the prosecution; triers were appointed for each juror and sworn, after which the triers took the jurors in separate rooms from the court and tried the grounds of challenge in the presence of defendant; they found the challenge not true, and the jurors so challenged resumed their seats. Of the six challenged for bias, four were subsequently challenged by defendant peremptorily. The other two were sworn.

No objection was made to the triers leaving the court-room, nor any exceptions taken thereto during the trial. The

jurors were examined by the triers, without any other testimony being introduced.

It was contended that the trial of the indictment began after, and not before the jury was sworn, and consequently the defendant's presence was not required at an earlier stage of the proceedings.

The court held that he must be present during his trial, that is, when every step was taken therein, and then, proceeding, said:

> "It is insisted, in behalf of the defendant, that the action of the court in permitting the trial, in his absence, of these challenges of jurors was so irregular as to vitiate all the subsequent proceedings. This point is well taken.
>
> "The Criminal Code of Utah does not authorize the trial by triers of grounds of challenge to be had apart from the court, and in the absence of the defendant. The specific provision made for the examination of witnesses 'on either side,' subject to the rules of evidence applicable to the trial of other issues, shows that the prosecuting attorney and the defendant were entitled of right to be present during the examination of the triers. It certainly was not contemplated that witnesses should be sent or brought before the triers without the party producing them having the privilege, under the supervision of the court, of propounding such questions as would elicit the necessary facts, or without an opportunity to the opposite side for cross-examination. These views find some support in the further provision making it the duty of the court, 'when the evidence is concluded,' and before the triers make a finding, to instruct them as to their duties. In the case before us, the instructions to the triers were given before the latter proceeded with the trial of the challenges.
>
> "But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must, be 'personally present at the trial.' The argument in behalf of the government is, that the trial of the indictment began after, and not before, the jury was sworn; consequently, that

the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position in decisions construing particular statutes in which the word 'trial' is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any step being taken, in the absence of the accused, and after the case is called for trial, which involves his substantial rights. The requirement is not that he must be personally present at the trial by the jury, but 'at the trial.' The code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the 'trial' of such challenges; some by the court, others by triers. The prisoner is entitled to an impartial jury, composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

"But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence.

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural

life, says Blackstone, 'can not legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com., 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com., 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

"For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused."

It will be observed that the common law requiring the presence of an accused during his trial, when charged with a felony, is identical with the Utah code, and the same is also true of Section 183 of the Kentucky Criminal Code of Practice; the Kentucky Code, Sections 212 to 216, are as follows:

"212. *Challenge tried by the court.* Challenges shall be tried and determined by the court in a summary manner, without the issues of law or fact arising thereon being reduced to writing, except when the court disallows a challenge for implied bias.

"213. *Juror may be examined on challenge.* The juror may be examined on oath by either party upon the challenge.

"214. *Other witnesses may be examined.* Other witnesses may also be examined, and their attendance coerced.

"215. *Commonwealth to challenge before defendant.* The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins.

"216. *Order of challenges.* The challenges of either party need not be all taken at once, but separately, in the following order:

"1. To the panel.
"2. To the juror for general disqualification.
"3. To the juror for implied bias.
"4. To the juror for actual bias.
"5. Peremptory (a)."

These sections are the same as the Utah code as to challenges, examination and introduction of evidence on said challenges. This Hopt case is in all respects the same as the case at bar, except the trial court in the Hopt case was a territorial court, and the challengers were passed upon by triers instead of the court, and in the case at bar consent was given, *while in the Hopt case no objection was made or exceptions taken to such examination.*

What is said by the Supreme Court of Iowa in State vs. Carman, 63 Iowa, 130-50; American Rep., 741, 18 N. W., 691, as to the waiver, by one charged with a felony, of a jury, applies with equal force here, that is:

> "The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision, based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be,

so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea."

In Bishop's "New Criminal Procedure," Section 271, it is said:

"The objection to allowing universal waiver is substantially public, not altogether private. The public has an interest in the life and liberty of the accused person. 'Neither,' said the Supreme Court of the United States, by Harlan, J., 'can be lawfully taken except in the mode prescribed by law. That which makes the law essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. * * * If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.' Added to which reason, it was said by Gibson, C. J., to be contrary to the dictates of humanity to let a prisoner 'waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence.' An examination of the authorities cited to this section, and to the other sections referred to herein, shows that some courts apply this doctrine to all felonies, others permit waiver in those less than capital. And there is a distinction between the right to waive the presence during the main trial, and while some collateral thing is being done."

The foot notes of this section refer back to Section 269, which section is as follows:

"If we look upon all the cases as correctly decided, they furnish no absolutely uniform rule as to whether or

not the prisoner must be present at the hearing of a motion. But if it relates to a mere matter of law, or if, in any other form, a question simply of law is agitated, the better doctrine, both in reason and authority, is that he may be absent at the argument, unless the court sees fit to require his presence. For where no fact *in pais* is involved, and all is of law, there is nothing which a lay prisoner can do or suggest in the case; his interests are then wholly in the keeping of his counsel. And even a fact *in pais*, blending with a question of law, may be so remote or collateral as not to require the prisoner's presence; for example, the amending of an information by altering the name of the owner of stolen property, the considering and making of an order changing the venue, assigning the case for trial or issuing an attachment for a witness, the drawing of a special venire, the hearing of a motion for continuance, or the taking of the recognizance of a witness."

In the case of Dougherty vs. Commonwealth, 69 Pennsylvania State Reports, 290, it is said:

"But if what purports to be the record of the Court of Quarter Sessions clearly appeared to be the record of the Court of Oyer and Terminer, it is so fatally defective that the conviction and sentence could not be allowed to stand. While the record shows that the defendant was arraigned, and pleaded not guilty, on the 6th of June, 1871, it does not show that he was present in court the next day when the jury were called and sworn, nor when they rendered their verdict. It does not appear by the record that the defendant was present in court between the 6th of June, 1871, when he was arraigned, and the 13th of July, 1871, when he came into court and received his sentence. Nor can his presence be presumed. In capital felonies it must appear by the record that the prisoner was present at the trial, verdict and passing of the sentence. It was so decided in Dunn vs. the Commonwealth, 6 Barr, 385; and the sentence there was reversed because it did not sufficiently appear by the record that the prisoner was present at the trial, particularly at the rendition of the

verdict, nor when sentence was passed. Nor do the cases of Cathcart vs. the Commonwealth, 1 Wright, 110, and Taylor vs. The Commonwealth, 8 *Id.*, 131, establish a different rule. If, as said in the former case and quoted approvingly in the latter, there is a presumption in criminal as well as in civil cases that the proceedings were regular, and it is incumbent on the plaintiff in error to show by the record that errors were committed before we can interfere, it was not intended to assert, as the opinions in these cases clearly show, that where 'the substantive parts of a proper record' are wanting, that their existence can be supplied by the presumption that all things were rightly done. In neither of these cases was there any allegation that the prisoner was not present when the verdict was rendered, or when the sentence was passed. In the latter case it is said: 'But taking the record as it stands, we have the facts distinctly appearing of the arraignment in court of the prisoner, of his presence when the jury were selected and sworn, when the verdict was rendered, and when the sentence was pronounced. The presumptions spoken of and referred to in these cases are: That the jury were properly sworn, when there is nothing on the record indicating any irregularity; that the prisoner had counsel, when there is nothing on the record to show that he was deprived of the right, and that he might have polled the jury if he had chosen so to do, if the record shows that he was present when the verdict was rendered. These and the like presumptions may doubtless be made, but not such as would supply the substantive and material parts of a proper record.' In Prine vs. the Commonwealth, 6 Harris, 104, Gibson, C. J., said: 'Never has there heretofore been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted he is asked at the bar what he has to say why judgment shall not be pronounced against him. These things are matters of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime.' The record before us, as we have seen,

does not show that the prisoner was present when the jury were sworn or when they rendered their verdict, and, though it shows his presence when the sentence was passed, it does not appear that he was asked if he had anything to say why judgment should not be pronounced against him."

In Wharton's "Criminal Pleading and Practice," 8th edition, Section 545, it is said:

"By the old common law form, each juror is required to look on the prisoner, and the prisoner on the juryman, before the juryman is sworn. Nor can the prisoner's presence, at this period be dispensed with or waived, in any case in which corporal punishment may be inflicted. Hence, in felonies, the record must show defendant to have been present at the arraignment."

In Prine vs. Commonwealth, 18 Pennsylvania, 103, it is said:

"It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. Never has there heretofore been a prisoner tried for felony in his absence. No precedent case can be found in which presence is not a postulate of every part of the record.

"He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him. These things are matters of substance, and not peculiar to trials for murder. They belong to every trial for felony at common law, because the mitigation of the punishment does not change the character of the crime. * * * What authority had the prisoner's counsel, in this instance, on the ground of pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for

where a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in court to do these things which his counsel could not do for him.

"It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable."

In Rolls vs. the State, 52 Miss. Reports, 396, it is said:

"We think the deduction from our own decisions, and the rule of safety, is to require the presence of the prisoner in all material and important steps taken during the progress of the cause. Of these are attendance during the empaneling of the jury, the delivering of the testimony, the rendition of the verdict, and the hearing of a motion for a new trial and in arrest of judgment, and when the sentence is pronounced."

In State (Mo.) vs. Smith, 90 Mo., 37, 59, American Reports, 4, it is said (Syllabus):

"The presence of a prisoner indicted for felony is necessary at the empaneling of a jury, and he may not waive the privilege, and his absence is not cured by the subsequent offer of the court to allow him to examine the jurors at the time of making peremptory challenge."

In French vs. State (Wisconsin), 21 Lawyers' Reports, Annotated, p. 405, it is said:

"This is not only the indispensable right of the accused, but the record must show that he enjoyed that right, or it does not show that he had a legal and constitutional trial. 'In felonies, the record must show the defendant to have been present at the arraignment and testing of the jurors. In capital cases, if not in all felonies, the record must show that the defendant was present at the trial, verdict and sentence.'—Whart. Crim. Pl. and Pr., Sections 545–549. The crime of murder is

still a capital crime in this State, because so recently followed by the death penalty. *People vs. Ferkins*, 1 Wend., 91. In such cases 'the presence of the prisoner is essential, and, where the law requires it, the record must show it.' 1 Bishop, Crim. Proc., Sec. 1353; Dougherty vs. Com., 69 Pa., 286; Prine vs. Com., 18 Pa., 103. This is the rule as well in all felonies. *Hooker vs. Com.*, 13 Gratt., 763; *Dyson vs. State*, 26 Miss., 362; *Rolls vs. State*, 52 Miss., 391; *Bearden vs. State*, 44 Ark., 331; *Smith vs. People*, 8 Colo., 457; *State vs. Johnson*, 35 La. Ann., 208; *State vs. Jones*, 61 Mo., 232; *Shapoonmash vs. United States*, 1 Wash. Terr., 188; *Lovett vs. State* (Fla.), 16 L. R. A., 313; *Chitty*, Crim. L., 414; *State vs. Buckner*, 25 Mo., 167; *State vs. Mathews*, 20 Mo., 55; *Clark vs. State*, 4 Humph., 254; *Andrews vs. State*, 2 Sneed, 550; *Scaggs vs. State*, 8 Smedes & M., 722; *Hopt v. Utah*, 110 U. S., 574, 28 L. Ed., 262; *Sylvester vs. State*, 71 Ala., 17. No presumption will be indulged in that the prisoner was present if the records fail to show it. *Douglass vs. State*, 3 Wis., 820; *Davis vs. State*, 38 Wisc., 487. This is held as to the arraignment of the prisoner, but his presence is just as essential. In the late case of *Ball vs. United States*, 140 U. S., 118, 35 L. Ed. 377, it is held essential that the record should show that the prisoner was present, and asked before sentence whether he had anything to say why sentence should not be pronounced against him. The Chief Justice cites *Rex vs. Harris*, 1 Ld. Raym., 267; 2 Hale, P. C. 401; Comyns, Digest, *Indictment*, N; 2 Hawk, P. C., Chap. 48, Section 22; Whart. Crim. Pl. and Pr., Sections 549–906; *Messner vs. People*, 45 N. Y., 1; *Dougherty vs. Com.*, *supra*; 1 Bishop, Crim. Proc., Sections 275, 1293, and other cases cited above."

In Samuel J. Anderson vs. the State, 2 Sneed (Tenn.), the Supreme Court, by Judge Totton, says:

"In criminal cases the grade of felony, where life or liberty of the accused is in peril, he has the right to be present, and must be present during the *trial* and until the final judgment. If he be *absent*, either in prison or

escape, then there is a want of *jurisdiction* over his person to proceed with the trial, or to receive the verdict, or to pronounce the final judgment.

"This rule, founded in the justice and wisdom of the common law, is, in substance, reiterated in our Bill of Rights. It is necessary to the full and free exercise of the rights of the accused, to make his defense; and in case he be legally convicted, that effect may be given on his person to the judgment of the court.

"2 Hawk, P. C., 619.
"Co. Lit., 227 b.
"Raymond, 193; 2 Hale, 300.
"4 Bl. Com., 355–360, Bac. Ab., Verdict.
"B–1 Chittie Cim. Law, 636.
"Clark vs. State, 4 Hemp. R., 254.
"Bill of Rights, Art. 1, Section 9."

Lucius Witt vs. the State (5 Coldiwell's Reports, Tenn., page 11), is even a stronger case to the same effect.

In Silas Gladden vs. the State of Florida, 12 Fla. Reports, 577, it is said:

"It is unnecessary for us to determine whether the prisoner can waive his right to be present during the trial, or whether a simple voluntary absence upon his part can be held to be a waiver of his constitutional right, and authorize the State to proceed in his absence. These questions have been settled in this State.

"This court has laid down the rule very broadly, and has, perhaps, extended it beyond the views of the courts of some other States. In Holton vs. State, 2 Fla., 500, the court says: 'During the trial of a capital case (the whole trial), the prisoner has a right to be, and *must be present. No steps can be taken by the court in the trial of the case in his absence. The prisoner charged must be present in court to make his objection to any and every step* 'that may be taken which he may deem illegal.'"

In Maurer vs. the People, 43 N. Y., page 1, it is said:

"The clause 'during such trial,' as used in the statute, includes all proceedings had in impaneling the jury,

the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, receiving and recording the verdict. * * *

"As the instructions were a proceeding in the trial, the Statute forbade their being given in the absence of the accused. The presence of his counsel at the time, and his failure to object, was not a waiver. By no consent of the accused, or his counsel, can an indictment for felony be lawfully tried in his absence, for the sufficient reason that the Statutes forbids it.

"In Cancemi vs. the People (18 N. Y., 128), it was held by this court that the consent of the defendant to be tried by a jury of eleven, and be bound by their verdict, was wholly invalid, and that a judgment against him, based upon such verdict, must be reversed, for the reason that the tribunal thus constituted had no jurisdiction. The like reason is applicable to the present case. The court has no jurisdiction to try an indictment for felony unless the accused be present. It is a familiar maxim that consent will confer jurisdiction, although it is a sufficient answer to any error committed in its exercise. It is urged by the counsel for the People, that the objection is unavailing, for the reason that the accused was not prejudiced by the communication made to the jury. A sufficient answer to this is, that this is not established."

In Hill against People, 16 Michigan 351, upon the general question whether the consent or silence of the court can excuse the failure of the court at the trial to enforce such essential rules and requirements as are prescribed by law for the trial of felony cases, the court says:

"The true theory, we think, is that the people, in their political or sovereign capacity, *assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such;* and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the Constitution, which secures the rights. * * *

"Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

Schick vs. United States, decided May 31, 1904, July 15, 1904, "Advance Sheets of the Opinions of the Supreme Court of the United States," page 826. Error to the District Court of the United States for the Northern District of Illinois, to review a judgment in favor of the United States for the penalty of fifty ($50) dollars imposed in a prosecution by information, under statutes imposing penalty for purchase and receipt for sale of oleomargarine not branded or stamped. Affirmed.

This court holding that the accused may waive a jury to which he is entitled under Section VI of the Constitution of the United States, as it does not include such petty offenses, and there is no congressional legislation or rule of public policy requiring a jury in such cases. *The entire holding in said case only relates to misdemeanor charges.* It is said therein:

"But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that

a defendant therein may not voluntarily waive a jury? Can it be that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and can not, when informed against for a petty offense, waive a trial by jury? Article 6 of the amendment, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right 'to be confronted with the witnesses against him, * * * and to have the assistance of counsel.' Is it possible that an accused can not admit, and be bound by the admission, that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. Authorities in the State courts are in harmony with this thought. In Com. v. Dailey, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel, and consented to be tried by eleven jurors; and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said (p. 83): 'He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court.'"

The case of Thompson vs. the State of Utah is a writ of error to the Supreme Court of the State of Utah to review a judgment of that court affirming a judgment of the lower court of that State convicting Thompson of the crime of grand larceny.

The indictment was returned in the District Court of the Second Judicial District of the Territory of Utah. The case was first tried when Utah was a Territory by a jury composed of twelve persons, a conviction had and a new trial granted, and the case removed to another county for trial. It was not again tried, however, until the admission of Utah into the Union as a State.

By the law in force at the time of the commission of the offense, a lawful jury was composed of not less than twelve jurors, but after the Territory was admitted as a State, a second trial was had and, by the laws of the State at that time in force, a jury was composed of only eight persons, and such jury tried defendant, of which, he complains, as error. It will be observed that this second trial was had in the State court, and this court, in passing upon the matter complained of, said:

> "It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.
>
> "In the case of Hopt vs. Utah, above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence. The court said: 'We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial.'"

The case of West vs. Louisiana, decided May 2, 1904, by the Supreme Court of the United States (see June 1, 1904, Advance Sheets, page 650), is one where the only question for the court to determine was, whether the admission of the deposition of Thebaud as evidence upon the trial of this case, deprived the plaintiff in error of "due process of law," and therefore was a violation of the Fourteenth Amend-

ment upon the part of the State, through its judicial department.

The case was brought to this court by writ of error to the State court. The Constitution of the State provided that the accused in every instance shall have the right to be confronted with the witnesses against him; it also appeared that the State had adopted the common law rules of evidence in criminal cases. It was shown, however, that the court of the State had repeatedly held *that evidence taken as herein*, could be read when the witness, at the time, was shown to be permanently absent from the State.

It was shown that Thebaud was a non-resident and permanently absent from the State and his attendance could not be procured, and that his evidence read was taken on a preliminary trial, and that he was then *in the presence of the accused, and cross-examined by his counsel.*

On these facts this court held that there was no specific provision in the Federal Constitution which makes it necessary in a State court that the defendant shall be confronted with the witnesses against him, as the Sixth Amendment does not apply to proceedings in State courts. That at common law the right existed to read a deposition *so taken in the presence of the accused and his counsel*, when the right of cross-examination was granted, provided, at the time of the trial the witness was dead, insane, or too ill ever to be expected to attend the trial, or was kept away by the connivance of the defendant.

Mr. Justice Peckham then says, referring to the permanent absence of the witness from the State:

> "There is some contrariety among the authorities and text writers whether, under the common law, a deposition is admissible in such case. Assuming, however, that the State court erroneously held what the common law was

on the subject, we must, in order to reverse this judgment, go further, and hold that a trial thus conducted and a deposition thus admitted did not furnish due process of law to the accused; in other words, that the refusal to exclude this deposition (an error regarding the admissibility of evidence) took away from plaintiffs in error a right of such an important and fundamental character as to deprive them of their liberty without due process of law.

"The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If, through its courts, it erred in deciding what the common law was, yet, if no fundamental and absolutely all-important right were thereby denied to an accused, he still had due process of law, and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal Constitution. * * *

"Coming to a decision of the question before us, we are of opinion that no Federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party, or to fundamentally impair those general rights which are secured to him by the Fourteenth Amendment. The accused has, as held by the State court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the State can not procure the attendance of the witness at the trial, and he is a non-resident and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.

"We say this with reference to the question whether the admission of the deposition fails to give the accused 'due process of law,' as provided for in the Fourteenth

Amendment. As the Sixth Amendment does not apply to State courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case."

It is true that in this case it is also said:

"Whether the State court erred in its construction of the State Constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the State court gives its own Constitution and statutes, and to the law which may obtain in the State, under the circumstances *such as those existing herein.*" (Italics are ours.)

As appears herein, this statement of the law is expressly limited to this especial case, or, rather, to the particular state of facts as shown herein, wherein it is held *that no fundamental and absolutely all-important rights were denied to the accused.*

The opinion, considered as a whole, concedes, if not directly, at least inferentially, that in a criminal trial the accused has certain *absolute and fundamental rights*, not created by the Sixth Amendment of the Federal Constitution, that the State can not, through any of its instrumentalities, deny, and that said *fundamental* rights are protected by the Fourteenth Amendment, one of which is, "*the right to be confronted with the witnesses*," and this necessarily implies the presence of the accused during the trial.

In this West case, the court held that this fundamental right had not been abridged or denied, because the accused had been *once confronted with the witness*, and the right of cross-examination granted and exercised.

The Constitution of the State of Kentucky, Section 233, adopts the "common law" of England into our system of

law; and as far as applicable to this case at bar, same has not been changed or modified, but upon the contrary, Section 11 of said Constitution is merely declaratory of the common law in providing that,

> "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; *to meet the witnesses face to face*, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, *nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.* * * *"

Section 183 of the Criminal Code of Practice of Kentucky, following the intent and purpose of said Section 11 of the Constitution, provides:

> "If the indictment be for a felony, the defendant must be present * * * during the trial."

And the courts of Kentucky have uniformly held, in conformity to said constitutional provision and statute, that the accused, except during NECESSARY TEMPORARY ABSENCE, must be present during the trial. *This exception was recognized at the common law.*

In the case of Temple vs. Commonwealth, 77 Kentucky (14 Bush), page 769, indictment for murder, decided 1879, it is said:

> "The code provides that 'While the jury are absent the court may adjourn from time to time as to other business, but it shall be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.' (Section 253).
>
> "There was, therefore, no impropriety in receiving the verdict at the time stated.
>
> "But whether it was not improper to receive it without notice to appellant's attorneys, and without affording them

reasonable opportunity to be present, and especially without the presence of the appellant, is a very different and much more important question.

"The Bill of Rights declares 'That in all criminal prosecutions the accused hath a right to be heard by himself and counsel.' The right to be heard by himself and counsel necessarily embraces the right to present himself, and to have a reasonable opportunity to have his counsel present also, at every step in the progress of the trial, and to deprive him of this right is a violation of that provision of the fundamental law just quoted.

"The presence of the accused is not a mere form. It is of the every essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor. And at no time in the whole course of the trial is this right more valuable than at the final step, when the jury are to pronounce that decision which is to restore him to the liberty of a citizen or to consign him to a scaffold or to a felon's cell in the State prison. He has a right not only to see and know that the whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his.

"The right to poll the jury in criminal causes has in this State always been deemed an essential part of the right of trial by jury. It is guaranteed by both the Constitution and the statute, and ought to be maintained and preserved by the courts as essential to the protection of the rights of the citizen.

"The error in receiving the verdict during the enforced absence of the appellant is not of the same class with those errors this court refused to consider in Kennedy vs. Commonwealth, *ante*, p. 340, and Frazier vs. Commonwealth, MS. Opinion, September Term, 1878.

"The errors complained of in those cases, if committed at all, were committed in overruling the motion for a new trial. Until then the court had not passed upon the

questions or been called upon to do so, and was ignorant of the alleged facts which were complained of as depriving the accused of the benefit of a fair trial. In this case the error was committed during the progress of the trial. The court knew the appellant was in custody, and it was the duty of the court to have him present when the verdict was received, and, in view of the time and circumstances, to have caused notice to be given to his counsel that they might have an opportunity to be present. Wherefore the judgment is reversed, and the cause remanded for further proper proceedings."

In Allen vs. Commonwealth, 86 Kentucky, 642, decided in 1888, it is said:

"This is a conviction for manslaughter.

"At the close of the argument to the jury, they were properly put under the charge of an officer, the accused being remanded to jail, and the court then adjourned for dinner. Upon assembling again, but in the absence of the accused, he being then in jail, the case was finally submitted to the jury, and they, under the charge of an officer, were sent to their room to consider of their verdict.

"It is the rule of the common law that the trial of one charged with felony must be had in his presence.

"In Sperry's case, 9 Leigh, 623, it was said: 'The well established practice in England, and in this State, is, that a prisoner accused of felony must be arraigned in person, and must plead in person; and in all the subsequent proceedings it is required that he shall appear in person.'

"This is his right. Judge Cooley says: 'In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment.' (Cooley's Const. Limitations, page 319.)

"Section 12 of our Bill of Rights provides, 'that in all criminal prosecutions the accused hath a right to be

heard by himself and counsel'; and in the case of Temple vs. Commonwealth, 14 Bush, 769, it was properly said: 'The right to be heard by himself and counsel necessarily embraces the right to be present himself, and to have a reasonable opportunity to have his counsel present also, at every step in the progress of the trial, and to deprive him of this right is a violation of that provision of the fundamental law.'

"In the case last cited, a judgment of conviction was reversed because the verdict was received in the absence of the accused, and when he was in jail.

"The Constitution of Alabama contains a like provision; and in the case of the State vs. Hughes, 2 Ala., 102, a judgment based upon a verdict similarly received was reversed. The same result followed from a like cause in The People vs. Perkins, 1 Wend., 91.

"In Meece vs. the Commonwealth, 78 Ky., 586, it was held that instructions to the jury in a felony case should not be given or modified in the absence of the defendant, because he has a right to be present at every step taken in his case. This rule is well founded. The life or liberty of the accused is in peril. He has the right to see that nothing is done or omitted to his prejudice; and his presence may exert an influence in his favor with his triers. If so, he is entitled to the benefit of it.

"Let us now see if the reason for the rule applies to the case in hand.

"When the jury are brought into court they should be called, so that it may be known that all and only those selected are upon it. The accused has a right to know that those who retire to the jury room to settle his fate are the same persons whom he has selected as his triers.

"The Criminal Code, by Section 183, provides that the defendant must be present 'during the trial' of a felony. This is but declaratory of the common law. * * * The right of the accused to appeal is altogether statutory; hence, in giving it, the legislature may impose such terms as it seems proper; and it has chosen to say that if, upon the entire record, it appears that the accused has not been prejudiced by the error, then it can not avail him. It is manifest, however, for various reasons, that the action of the court which we have been discussing was improper,

because of the defendant's absence at the time; and unless it affirmatively appears from the record that the accused was in no wise prejudiced by such an error, a reversal would result."

In the case of "Temple vs. Commonwealth," 77 Ky., it is said:

"The Bill of Rights declares 'that in all criminal prosecutions, the accused hath a right to be heard by himself and counsel.' The right to be heard by himself and counsel necessarily embraces the right to be present himself and to have a reasonable opportunity to have his counsel present also, at every step in the progress of the trial, and to deprive him of this right is a violation of the provision of the fundamental law just quoted.

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial, not only that the accused shall be brought face to face with the witnesses against him, but also with his triers."

Again,

"The error in receiving the verdict during the enforced absence of the appellant is not of the same class with those errors this court refused to consider in Kennedy vs. Commonwealth, *ante*, p. 340, and Frazier vs. Commonwealth, MS. Opinion, September Term, 1878.

"The errors complained of in those cases, if committed at all, were committed in overruling the motion for a new trial. Until then the court had not passed upon the questions or been called upon to do so, and was ignorant of the alleged facts which were complained of as depriving the accused of the benefit of a fair trial. In this case the error was committed during the progress of the trial. The court knew the appellant was in custody, and it was the duty of the court to have him present when the verdict was received, and, in view of the time and circumstances, to have caused notice to be given his counsel, that they might have an opportunity to be present."

In the "Kennedy" and "Frazier" cases referred to, the decisions were made to rest upon Section 281 of the Criminal

Code, but the court held that by reason of the facts in the "Temple case" it did not come under said section.

In this case at bar, the facts are as in the "Temple case"; the court knew Howard was in custody—prison—(see printed record, page 4) and it was the duty *of the court* to have him present when the juror J. C. Alexander was examined.

In Hill vs. People, 16 Michigan, 351, it is said:

> "The true theory, we think, is that the people in their political sovereign capacity, assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panel of jurors, and other safeguards for his trial, in accordance with the Constitution, which secures the rights. * * *
>
> "It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

OPINION OF THE COURT OF APPEALS OF KENTUCKY.

In the opinion rendered in the case at bar by the Court of Appeals of Kentucky, said court, after quoting Section 183 of the Kentucky Criminal Code of Practice, says (printed record, page 67):

> "While this court, in construing section *supra*, has repeatedly held that one charged with the commission of a felony can not be tried during his absence from the court room, we find that cases have arisen in which it has been deemed necessary to relax that rule."

And in support of said holding, cites the cases of Hite vs. Commonwealth, 14 Ky. Law Reporter, 308, and Meece vs. Commonwealth, 78 Ky., 586.

This "Hite case" seems not to have been well considered, and is marked, "*Not to be reported*"; besides, it only held *that the occasional necessary temporary absence from the court room of the accused for a few minutes, on account of illness, the trial continuing in his absence*, did not prejudice his substantial rights. Such necessary absence is, at common law, an exception to the rule. Wharton's Criminal Pleading and Practice, 8th Edition, Section 540.

In the "Meece case," the following words were inserted, in the absence of the accused, in an instruction on manslaughter, viz.:

> "*In arriving at a conclusion on this point, the jury must take into consideration all the facts and circumstances proven in the case.*"

In this case, the court said:

> "Upon the facts of the record, it would have been difficult to have given an instruction prejudicial to the substantial rights of the accused. It was a killing without justification or excuse, and the law of the case as presented to the jury was more favorable to the accused than the facts warranted. * * *"

Again:

> "The presence of the accused may be, and certainly is, essential to the ends of justice in the trial of all criminal offenses when his life or liberty is involved. When instructions are given by the court, or when the jury, returning from their room, desire to be further instructed, the presence of the accused is of the greatest importance, as he may be able to suggest to the court or his counsel some information that would throw additional light on

his defense. He should also be present, that he may except to the ruling of the court; but while this is the case, the court to which his appeal is presented is not authorized to reverse the judgment against him, unless, when considering the whole case, it clearly appears that his substantial rights have been prejudiced by the ruling below. One charged with the commission of a felony can not be tried during his absence from the court room, and when any step is taken during the trial in the absence of the prisoner, the record must show affirmatively that he could in no wise have been prejudiced by it, else this court will reverse the judgment. The evidence in this case is so plain as to the guilt of the accused and the enormity of the offense, that no slighter punishment could have been inflicted, and we are satisfied the ends of justice require that the judgment should be affirmed."

In the "Meece case" it was *affirmatively shown* by the record that the substantial rights of the accused were not prejudiced.

It is not pretended that in this case it is *affirmatively* shown that the substantial rights of Howard *were not prejudiced.*

In the case of Maurer vs. People, 43 N. Y., page 1, in passing upon this point, the court said:

"It is urged by the counsel for the people that the objection is unavailing for the reason that the accused was not prejudiced by the communication made to the jury. A sufficient answer to this is, that this is not established."

In the opinion in the case at bar it is said:

"*There are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive. Such as the right of trial by jury, the right to be heard by himself and counsel* (the italics are ours), to demand the nature and cause of the accusation against him, and yet

> others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jurors to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury." (Printed Record, page 68.)

In Temple vs. Commonwealth, 77 Ky., page 796, it is said:

> "The right to be heard by himself and counsel necessarily embraces the right to be present himself. * * *"

The Court of Appeals, in its opinion herein, concedes that the rule is well established that the defendant must be present during the trial, but says that this rule has been relaxed, and cites the two cases hereinbefore referred to in support of said statement, one of which merely relates to the temporary absence on account of illness, the other where the court refused to reverse on account of the temporary absence of the defendant during the trial, because it *affirmatively appeared from the record*, that the substantial rights of the accused had not been prejudiced.

The relaxation of the rule in neither of these cases has any application whatever to the state of facts existing in the case at bar. On page 4 of the printed record it is shown that Howard was then in ACTUAL CUSTODY—IN PRISON—and it was the DUTY OF THE COURT to have him present at the examination of juror J. C. Alexander, and therefore *no question of "necessary temporary absence" could or did arise.*

As to the second case cited (Meece), the decision was based upon a statutory provision of the State of Kentucky. By Section 340 of the Criminal Code it is provided :

> " A judgment of conviction shall be reversed for any error of law to the defendant's prejudice, appearing on the record."

By an Act, approved March 4, 1880, this section was amended so as to read :

> " A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the court is satisfied that the substantial rights of defendant have been prejudiced thereby."

In construing this section as amended, in the case of Rutherford vs. Commonwealth, 78 Ky., 640, the court said :

> " If this amendment is ordinarily to have any effect, it must be construed to mean that the power of this court to reverse in felony cases depends upon two things : *First*, that an error appears on the record ; *Second*, the court must be satisfied, from consideration of the whole case, that the substantial rights of the accused have been prejudiced by the error complained of. But while the statute receives this construction, it must be allowed a certain flexibility which will exclude from its operation cases not reasonably presumed to have been contemplated by the lawmakers. The letter must not be so construed as to kill the spirit. *Qui haeret in literis haeret in cortice.* The theory of the Code of Practice is, that the accused did in fact have a trial in the court below which was substantially according to common law procedure. If there was no trial of that character, or if there was a so-called trial which was only a trial in form and not in substance, it is not reasonable to presume that it was the intention of the lawmakers that this court should be confined in its revisory jurisdiction to such errors as

appear affirmatively on the face of the record. It is more reasonable to infer that when there is a departure from the fundamental rules of criminal procedure that this court should reverse, unless it affirmatively appear from the record that the error complained of was not prejudicial. Especially should this be the construction when, on account of the enforced absence of the accused, he is unable to make known what errors were in fact committed. Without enumerating all of the rules of criminal procedure that may be considered fundamental, it is sufficient to mention the right of the accused to trial by jury, *to be heard by counsel, and to be present during the trial.*" Meece vs. Commonwealth, 78 Kentucky Reports, 586. (Italics are ours.)

In the case of Allen vs. Commonwealth, 86 Kentucky, 642, heretofore set out at length in this brief, it is said:

"The right of the accused to appeal is altogether statutory; hence, in giving it, the legislature may impose such terms as it sees proper; and it has chosen to say that if, upon the entire record, it appears that the accused has not been prejudiced by the error, then it can not avail him. It is manifest, however, for various reasons, that the action of the court which we have been discussing was improper, because of the defendant's absence at the time; *and unless it affirmatively appear from the record that the accused was in no wise prejudiced by such an error, a reversal would result.*" (Italics are ours.)

It appears that in this second case (Meece) cited by the court the same construction as in above cases was given this section, and that the failure to reverse was rested solely upon the fact that the record in this case clearly showed, *affirmatively*, that the substantial rights of the accused *had not been prejudiced.*

In the case at bar, it did not appear affirmatively from the record, that the defendant Howard's substantial rights had

not been prejudiced herein, *nor did the court, in its opinion, so hold*; but, upon the contrary, said opinion concludes as follows (printed record, page 72):

> "A careful examination of the record having failed to disclose any error prejudicial to the substantial rights of the appellant, the judgment is affirmed."

It thus appears, in this case, that the court placed the *burden* upon the *defendant* to show that *a violation* of his *fundamental* right to be present at the trial, was prejudicial to him, whereas the proper construction of the statute, given by the Kentucky court, under the state of facts as here presented, is, *that the record must show affirmatively that the defendant was not prejudiced.*

As the court did not hold *that it did affirmatively appear from the record* that the substantial rights of the defendant *had not been prejudiced*, and as the record shows that he was absent during the trial, it is thought that this makes out a conclusive case that his said rights were prejudiced, but if, in this, we are incorrect, and this court thinks the *entire* record must be considered, same is filed in this court, and can be inspected.

In Crowley vs. United States it is said:

> "In this connection the government calls attention to Sec. 1025 of the Revised Statutes (U. S. Comp. Stat., 1901, p. 720), providing that 'No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' This section can have no bearing on the present case, for the disqualification of a grand juror is prescribed by statute, and can not be regarded as a mere defect or imperfection in form; it is

matter of substance, which can not be disregarded without prejudice to an accused."

It is apparent that the *holding* in this case at bar is not an attempt to change or modify the construction given Section 340 of the Criminal Code of Kentucky in the cases of

Meece vs. Commonwealth, 78 Ky., 586;
Rutherford vs. Commonwealth, 78 Ky., 640;
Allen vs. Commonwealth, 86 Ky., 642;

Or due to any failure of the court to recognize same, because in said opinion *the "Meece case" is cited with approval*, and in that case this construction is clearly stated as follows:

"One charged with the commission of a felony can not be tried during his absence from the court room, and when any step is taken during the trial in the absence of the prisoner, the record must show affirmatively that he could in no wise have been prejudiced by it, else this court will reverse the judgment."

The opinion herein shows on its face, not a misconception of a law, but a total disregard of a well established, known and accepted construction thereof, and such action was and is a violation of the Fourteenth Amendment to the Constitution of the United States, not due process of law, and denies to the accused the equal protection of the law.

To hold, where the record shows a violation of the fundamental right of the accused to be present during the trial, that it fails to disclose any error prejudicial to his substantial interests, is a contradiction within itself; this right is not one of form, but of substance, and can not be disregarded without prejudice to the accused, and this holding is a denial of the right.

It is true that the right of appeal does not exist except by legislation of the State on the subject, and when permitting an appeal the lawmaking power has a right to determine for

what cause a reversal may be had, but that doctrine is not applicable to Section 340 of the Criminal Code of Practice of Kentucky, because the legislature did not undertake thereby to determine for what cause a reversal may be had, except in a general way—that is, the matter was left with the Appellate Court to determine, "upon a consideration of the whole case," so, finally, the court determines the matter as it does any other legal proposition submitted to it.

In Rogers vs. State of Alabama, decided by this court, Jan. 18th, 1904 (No. 407), Feb. 15th, 1904, Advance Sheets of "All Opinions of the United States Supreme Court," it is said, Mr. Justice Holmes delivering the opinion of the court:

> "This is a writ of error to the Supreme Court of Alabama, brought on the ground that the plaintiff in error, one Rogers, has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States. Rogers was indicted for murder, and in due time filed a motion to quash the indictment because the jury commissioners appointed to select the grand jury excluded from the list of persons to serve as grand jurors all colored persons, although largely in the majority of the population of the county, and although otherwise qualified to serve as grand jurors, solely on the ground of their race and color, and of their having been disfranchised and deprived of all rights as electors in the State of Alabama by the provisions of the new Constitution of Alabama. The motion alleged that the grand jury was composed exclusively of persons of the white race, and concluded with a verification. To show the reality of the second reason alleged for the exclusion of blacks from the grand jury list, the motion, as a preliminary, alleged that the sections of the new Constitution which were before this court in *Giles vs. Harris*, 189 U. S., 475, 47 L. Ed., 909, 23 Sup. Ct. Rep., 639, were adopted for the purpose, and had the effect, of disfranchising all the blacks on account of their race and color and previous condition of servitude. On motion of the State this motion to quash was stricken from the files. Rogers excepted, but his exceptions were overruled by the Supreme

Court of the State, seemingly on the ground that the prolixity of the motion was sufficient to justify the action of the court below. *The Civil Code of Alabama provides by Section 3286, 'if any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out, at the costs of the party so pleading, on motion of the adverse party.'*

"*We follow the construction impliedly adopted by the Supreme Court of Alabama, and assume that this section was applicable to the motion.* (Italics are ours.) We also assume, as said by the court, that the qualifications of the grand jurors are not in law dependent upon the qualifications of electors, and that any invalidity of the conditions attached to the suffrage could not of itself affect the validity of the indictment. But in our opinion that was not the allegation. The allegation was that the conditions said to be invalid worked as a reason and consideration in the minds of the commissioners for excluding blacks from the list. It may be that the allegation was superfluous and would have been hard to prove, but it was not irrelevant, for it stated motives for the exclusion which, however mistaken, if proved, tended to show that the blacks were excluded on account of their race, as part of a scheme to keep them from having any part in the administration of the government or of the law. The whole motion takes two pages of the printed record, of the ordinary octavo size. A motion of that length, made for the sole purpose of setting up a constitutional right, and distinctly claiming it, can not be withdrawn for prolixity from the consideration of this court, under the color of local practice, because it contains a statement of matter which, perhaps, it would have been better to omit, but which is relevant to the principal fact averred.

"*It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights.* (Italics are ours). It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank vs. Skelly*, 1 Black, 436-443, 17 L. Ed., 173-177. But that is merely an illustration of a more general rule. On the same ground there can be no doubt that if full faith and credit were denied to a judgment rendered in another

State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Sav. & Loan Soc. vs. Dormitzer*, Jan. 4, 1904, 192 U. S., *ante*, 221; 24 Sup. Ct. Rep., 221. In *Chapman vs. Goodnow*, 123 U. S., 540, 547, 548, 31 L. Ed., 235, 238, 8 Sup. Ct. Rep., 211, where the parties sought to avoid the obligation of a former decree by new matter, this court said that the effect of what was done was not a Federal question, but proceeded to inquire in terms whether that ground of decision was the real one, or whether it was set up as an evasion, and merely to give color to a refusal to allow the bar of the decree. We are of opinion that the Federal question is raised by the record, and is properly before us. That question is disposed of by Carter vs. Texas, 117 U. S., 442, 44 L. Ed., 839, 20 Sup. Ct. Rep., 687, and it was error not to apply that decision. The result of that and the earlier cases may be summed up in the following words of the judgment delivered by Mr. Justice Gray: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder vs. West Virginia*, 100 U. S., 303, 25 L. Ed., 664; Neal vs. Delaware, 103 U. S., 370, 397, 26 L. Ed., 567, 574; Gibson vs. Mississippi, 162 U. S., 565, 40 L. Ed., 1075, 16 Sup. Ct. Rep., 904.' Our judgment upon this point makes it unnecessary to consider a motion to quash the panel of the petit jury for similar reasons, which was disposed of as having been made too late.

"*Judgment reversed*, and case remanded for further proceedings not inconsistent herewith."

In the opinion rendered by the Court of Appeals in the case at bar, it is said:

"In addition to those cases, a further recent authoritative utterance of this court to the same effect will be found in Alderson vs. Commonwealth, 25 L. R., 32, in which

one of the grounds for reversal, as set forth in the record, was that the appellant, over his objection at the time, was forced by the trial court, to accept as jurymen persons alleged to have formed an opinion as to his guilt or innocence.

"Another alleged error was that, after the Commonwealth had accepted, in open court, the full panel of twelve jurymen, and after they had been passed to the appellant for acceptance or peremptory challenge, and he and his counsel had retired from the courthouse to pass upon the panel, the court, over appellant's objection, permitted the Commonwealth to object to and excuse one of the jurymen without cause, though the whole twelve had been accepted by it. Whereupon appellant, as was done in the case at bar, moved the court to dismiss the entire jury, which motion was overruled.

"In passing on the questions thus presented, this court, after quoting Section 281 of the Criminal Code, *supra*, said:

"'In construing this section we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal.'"

We have examined said case of "Alderson vs. Commonwealth," 25 Kentucky Law Reporter, 32, above referred to, carefully, and find, from the case as reported, that no such facts as recited in the opinion existed, and no such questions were presented in said "Alderson case" for determination, or were determined therein. We are at a loss to know how such a mistake could have been made, as no case so completely "on all fours" with the case at bar has ever been, to our knowledge, determined by the Kentucky courts; but if it had, it is insisted that said holding would have been in violation of defendant's rights under the Fourteenth Amendment, the same, as herein contended, being violative of fundamental rights. For the benefit of this court, as well as to show that we are correct, a complete copy of the said opinion

in the Alderson case is inserted, omitting only the "instructions."

"The appellant, Geo. B. Alderson, was indicted by the grand jury of Simpson County, charged with the willful murder of P. D. Hall. A trial of the case resulted in his conviction and sentence to confinement in the penitentiary for the term of his natural life. To reverse this judgment he has appealed to this court.

"On the 4th of January, 1902, about 8 o'clock at night, P. D. Hall was assassinated, as he sat by the fireside of his home, in his family circle. The murder was committed by firing a double-barreled shotgun, loaded with slugs, through the window of the sitting room, blowing out the brains of the victim. No one saw the assassin, but upon the following morning the sheriff, with a posse, made an examination of the premises, and found what they thought to be tracks of the murderer, leading from the yard of the murdered man across several fields and into a path leading from appellant's stable to his dwelling house, where they were lost. At one point along the trail the tracks, by reason of the softness of the ground, were made quite plain, and these were carefully measured by the officers of the law. Suspicion pointed towards appellant, because of the fact that some six months before the murder he had had a difficulty with the decedent, which resulted in a complete estrangement of the men, who had theretofore been friends.

"The sheriff, on the morning after the murder, went to the house of appellant and inquired of him whether he had seen any one pass through his place the night before; to which he responded that he had not. Upon request, he readily produced his every-day shoes, which were carefully compared with the tracks the officer had found, by applying to them the measurements they had taken. These measurements were thought by the officers to show that appellant's shoes corresponded with the tracks. Appellant also, upon request, without any hesitation, produced his double-barreled shotgun, which, being carefully examined, was found, in the opinion of the officers, to have been quite recently fired, the inside of the barrels being moist, and upon the loads being

twisted out, the paper wadding was moist and discolored with the damp black of recently exploded powder. This paper wadding, upon examination, was found to have been torn from a copy of a newspaper which was lying on the floor of appellant's room when the sheriff entered. The percussion caps on the tubes of the gun were quite bright and new, exhibiting no evidence of corrosion.

"It is sought to be shown that the gun, with which the murder was committed, was a muzzle-loading, double-barreled shotgun, by the fact that two shots were fired through the window almost simultaneously, and the gun was loaded with paper wadding which was picked up inside the room where the murdered man was sitting at the time he was killed. There was evidence conducing to show that the appellant had traded for the shotgun he exhibited to the sheriff within a month or two before the killing; that within a short while before the murder he had one of the locks of the gun fixed by a gunsmith in the city of Franklin, the county seat of Simpson County, and also that he had, about the same time, attempted to purchase buckshot from a merchant in Franklin, but without success, as the merchant had none in stock. He did, however, purchase a package of No. 6 shot, saying that the shot he had was No. 8, and too small to kill anything.

"It was shown by the testimony of one Perry Stamps that appellant and the decedent had a serious quarrel in July, 1901, which, however, did not result in blows; that after the murder the appellant asked him if anybody but himself knew of this difficulty, to which the witness replied: 'Yes, your wife knows about it.' Stamps also testified that in this conversation appellant said to him, 'If they were to prove that I bought buckshot, they would mighty nigh have me, wouldn't they?' and asked him not to say anything about what he had said.

"E. V. Bogan, the sheriff of Simpson County, testified that while he was guarding appellant during the examination trial he had a bullet in his hand, and that appellant said to him: 'If any one found where I bought, or tried to buy, buckshot, they might hang me, or I would plead guilty.' This is a substantial outline of the evidence adduced by the Commonwealth upon the trial.

"The appellant denied his guilt, or that he had offered to buy buckshot, or made the statements above set forth, as given in the evidence of Stamps and Bogan. By his father-in-law, W. A. Wallace, he sought to establish an alibi, by showing that Wallace stayed at his (appellant's) house on the night of the killing, and knew that he was there at the hour of 8 o'clock, the time at which the murder was committed. Appellant, through his counsel, complains of, first, error of the court in impaneling the jury; second, error of the court in admitting incompetent evidence to be introduced by the Commonwealth; third, in overruling the motion by appellant for a peremptory instruction; fourth, error of the court in misinstructing and refusing to properly instruct the jury; fifth, the verdict of the jury and the judgment was contrary to the law and evidence in the case; sixth, error of the court in permitting the county attorney, who made the concluding argument for the Commonwealth, to state and argue facts to the jury not based upon the evidence in the case, and which were prejudicial to the substantial rights of appellant.

"Section 281 of the Criminal Code provides that 'the decision of the court upon challenges to the panel, and for cause, for motions to set aside an indictment, and upon motion for a new trial, shall not be subject to exception'; and in construing this section, we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal. (Curtis, alias A. J. Randall, vs. Commonwealth, 23 Ky. Law Rep., 267.)

"An examination of the evidence complained of as incompetent, which the court admitted over the exceptions of appellant, and that which was excluded contrary to his objections, convinces us that he has no just ground to complain of the court's rulings. One of the most serious objections made to the admission of testimony by the Commonwealth was in permitting Perry Stamps to detail the contents of a letter written by appellant to P. D. Hall upon the day following their altercation in July, 1901. It is contended that this testimony was incompetent, because the absence of the letter was not accounted for, and the court should not have permitted the witness

to state the contents of the writing until its absence was explained. Counsel for appellant earnestly insist that this testimony was not introduced to show a threat on the part of appellant towards the decedent, but from a desire to show that appellant was an infidel, and to enable the attorney for the Commonwealth to use this fact as an argument to the jury against appellant.

"The learned counsel overlook the fact that appellant shows that the letter in question was returned to him by Stamps, and destroyed. In answer to a question by his counsel, as to what became of the note, he said: 'I don't remember what disposition was made of it; destroyed in some way. Mr. Stamps returned the note to me, after reporting that he had read it to Mr. Hall.

"'*Q.* When was it destroyed?

"'*A.* The same day it was sent.

"'*Q.* Just state, if you recollect, the exact language of the note.

"'*A.* Can't be exact in my words; some few words can give the exact language; I can state in substance all the note; I did not date the note or address the note. It began this way: "I shall not interfere with you or your business; I shall not say anything of you or your affairs; I shall not say anything to interfere with you in your business nor in your affairs, nor the good will and esteem of your neighbors. I require the same treatment at your hands. Our account is now settled forever, if there be no God; if there is a God, which, probably, you and I both doubt, I leave the final balancing of our account in his hands."'

"Conceding it to have been error to have allowed the Commonwealth's witness to have detailed the contents of the foregoing letter without accounting for its absence, and that the letter itself was incompetent, appellant clearly cured these errors by showing that he had destroyed the letter, and by testifying to its contents with more elaboration than did the witness for the State. Although counsel complained in their brief that the Commonwealth's attorney used the contents of this note in his address to the jury to show that appellant was an atheist, the bill of exceptions does not show that such argument was made. They also complain that the witness, Stamps,

was allowed to testify as to the effect produced on Hall when the letter was shown or read to him, although the record shows that the court excluded this testimony.

"It is not necessary to set forth, or discuss, the objectionable evidence at any great length or detail. We are satisfied that the rulings of the court were in accordance with the law of the case; were entirely just to appellant, and afford no ground for reversal. The third and fifth errors complained of may be considered together. There was certainly evidence adduced by the Commonwealth, which, if true, tended to establish appellant's guilt; and while it was entirely circumstantial, and, we think, meager, it was competent; and this court has uniformly held that a criminal case will not be reversed on the ground that it is contrary to the weight of the evidence, if there be any evidence to support the verdict. (Vowells vs. Commonwealth, 83 Ky., 193; Patterson vs. Commonwealth, 86 Ky., 315; White vs. Commonwealth, 96 Ky., 180; Travers vs. Commonwealth, 96 Ky., 77.) * * *

"These instructions contain the whole law of the case, and this was all to which appellant was entitled. There was no error in refusing the two instructions offered by appellant as all that was proper in them was contained in those given. Conceding that we could consider on this appeal the indictment complained of as to what took place in the presence of the jury at the hotel, while they were in charge of the sheriff, we do not think that the interest of the appellant was injured thereby. What was said in the presence of the jury by Mrs. Duncan and Mrs. Harris was favorable to him. The affidavit of these ladies on this point does not show that what Sheriff Bogan said was heard by the jury, and the sheriff's affidavit shows that what he said was not in their hearing, and could not, therefore, have been prejudicial to appellant's interest. Nor are we able to see that the argument of the Commonwealth's attorney to the jury constitutes misconduct. The objectionable language, as shown by the bill of exceptions, is this: 'Said attorney argued that if one of the jurymen was guilty of a crime, and on a trial eleven should be shown to be innocent, the conclusion would be inevitable that the twelfth one would be guilty, and then turned to the defendant and his counsel, daring them to arraign

all the men in the community where deceased, Hall, lived, all men in Simpson County, and in Kentucky, and their innocence would appear.' This was a mere hypothetical illustration, made for the purpose of reinforcing the Commonwealth's position as to the guilt of appellant, and while it may be admitted that it was inconsequential logic, we do not think it was improper.

"We have not undertaken to give all of the evidence adduced in the case in detail, but only such outline as will serve to illustrate the principles of law necessary to be adjudicated. There was much that is omitted, but, with it all, we are deeply impressed with the fact that it constitutes but a slender foundation for depriving one of his liberty during his natural life. However, it is not for us to invade the province of the jury, and to set up our opinion against theirs on the merit of the testimony. The appellant was tried for a most heinous crime, the assassination of his neighbor; for this he was tried in the county of his residence, among his friends and neighbors, by a jury of the vicinage. Necessarily the effectiveness of the evidence against him depended on the character of the witnesses for the Commonwealth and his own standing and that of his witnesses in the community where they lived; of these things the jury who tried the case were far more competent to judge the very truth than the court whose province it is to decide the law.

"Wherefore, the judgment is affirmed.

"Whole court sitting.

"Chief Justice Burnam and Judges O'Rear and Nunn dissenting."

The dissenting opinion takes the position that, under the facts stated in the original opinion, it is shown that defendant did not have a fair trial.

The statement made in the opinion rendered in this Howard case as to the facts in this case is correct ONLY IN THIS, that is, that appellant did assign as error the impaneling of the jury, and after quoting Section 281 of the code the court did say, in construing this section:

"We have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualification, shall not be considered on appeal."

The court did not deem this decision important, or as settling any novel question, and marked same "*Not to be reported.*"

IN A FELONY CASE, WHEN DOES THE TRIAL BEGIN?

In the opinion herein (Record, page 68) it is said:

"It has also been held by this court that a trial for felony begins when the jury is sworn. Willis vs. Commonwealth, 86 Ky., 68."

By Section 183 of the Criminal Code of Practice it is provided:

"*On trial for felony defendant must be present.*—If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial; unless his bail appear personally in court, and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. * * *"

This section was enacted to secure, in any event, *the actual continuous presence of the defendant during the trial; a necessary jurisdictional fact* to authorize the court to proceed.

By Section 229 it is provided:

"*Defendant to remain in custody during felony trial.*—During the trial of an indictment for felony, the defendant shall be committed to and remain in custody of the proper officer."

This section was enacted to fix the *rights and liabilities* of the bail *during the trial* and before final submission where no consent, as provided by Section 183, is given.

These sections have been so construed; that is, Section 183 as providing for the *actual continuous presence* of the defendant during the trial, regardless as to whether or not he is on bond or in custody—because, if on bond, and he fails to so attend during the trial, his bond is forfeited; and Section 229 as relating to and fixing the rights and liabilities of the bail.

This case of Willis vs. Commonwealth, 86 Kentucky, 68, referred to, is, in full, as follows, Judge Lewis delivering the opinion of the court:

> "By the terms of the bond given by appellants as bail for Strange, charged with murder, they undertook that he should appear in the Cumberland Circuit Court to answer the charge, and at all times render himself amenable to the orders and process of said court in the prosecution of said charge.
>
> "They did not, at any time before the forfeiture of their bond, surrender the defendant to the jailer of the county, but they were still bound when he appeared in court at the June term, 1883; and the question is presented whether anything was, after that, done by the court, or by them, which, under the Criminal Code, exonerated them. It appears that the motion for a continuance at that term was overruled, and the accused required to go into the trial, and ten jurors were selected and accepted by the Commonwealth and the accused. But the court adjourned for the day without completing the formation of the trial jury, and the next day the court, on its own motion, discharged the ten jurors and continued the case until the next term, because the officer in whose charge they were placed permitted them to separate, contrary to law and the injunction of the court.
>
> "Section 229 of the code provides that, during the trial of an indictment for felony, the defendant shall be committed to and remain in the custody of the proper officer.
>
> "But, by Section 183, it is provided that if the indictment be for a felony the defendant must be present, and

shall remain in actual custody during the trial, unless his bail appear personally in court and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury.

"After the trial has commenced the defendant is in custody of the proper officer of the court, and the bail is no longer answerable for his appearance, unless, as provided in Section 183, they appear personally in court and consent that he remain on bail. But, in order to be exonerated before the trial commences, it is necessary for the bail to either surrender the defendant to the jailer, as provided in Chapter 2, Title 5, or to the custody of the court while in session, which must be shown by the record to have been done.

"It does not appear from the record in this case that the bail surrendered, or offered to surrender, the defendant to the court. On the contrary, it is recited in the order book that the defendant came into court in proper person, but not in discharge of his bail bond, and the same recital is made in reference to his appearance on the day the ten jurors were discharged, and at the next term of the court. But if the defendant at any time, by operation of law, was taken out of the custody of the bail and placed in that of the court, a subsequent recital in the order book should not bind them unless by their consent.

"The decisive inquiry then, is, when does the trial of an indictment for felony, in the meaning of Section 229, begin? It seems to us it can not, with propriety or accuracy, be said to begin until the issue is formed and the jury sworn to try it. For, as has been held by this court, the defendant can not be regarded as being in jeopardy of his life or liberty until then. Everything done previously is merely preliminary to the trial.

"Judgment affirmed, with damages."

This "Willis case" was under Section 229, to determine the *rights and liabilities* of the bail, when the defendant failed to answer, and the court therein says:

"The decisive inquiry, then, is, when does the trial of an indictment for felony, *in the meaning of Section 229, begin?*"

In cases where, under a plea, the question of former jeopardy is at issue, the courts have held that *jeopardy attaches* when the jury is sworn and charged with the deliverance of the prisoner, and in this "Willis case" it was held that in determining the liability of the bail under Section 229 *the trial did not begin until the jury was sworn and such deliverance of the prisoner made.*

Neither *former jeopardy* nor *the liability of the bail* is here involved, but under Section 183 the sole question is, on the one hand, the right of the accused to be present during the *whole trial*, when any step is taken therein affecting his substantial rights, and on the other, the necessary presence of the accused *to give jurisdiction to the court to proceed.*

It seems unreasonable to say, when considering the rights of the accused, that the trial does not begin until the jury is sworn; he must be present continuously from the arraignment to the close of the trial, and to him there is no period during the trial more important than when the jury, who are to determine his fate, ARE BEING SELECTED; besides, the Criminal Code gives the right to either party, during the selection of the jury, to try and determine the challenges in a summary manner before the court, examine the jurors on oath, and introduce other witnesses.

In the case of Hopt vs. Utah, 110 U. S., 574 (28-265) this same question was made, and the court said:

> "But all doubt on the subject is removed by the express requirement, not that the defendant may, but where the indictment is for a felony, must, be 'personally present at the trial.' The argument in behalf of the government is that the trial of the indictment began after and not before the jury was sworn; consequently, that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position in decisions

construing particular statutes in which the word 'trial' is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken, in the absence of the accused, and after the case is called for trial, which involve his substantial rights. The requirement is, not that he must be personally present at the trial by the jury, but 'at the trial.' The code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the 'trial' of such challenges; some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of his defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins."

In the "Bill of Rights," Section 11, it is provided:

"In all criminal prosecutions the accused has the right to be heard by himself and counsel.

* * * * * *

"The right to be heard by himself and counsel necessarily embraces the right to be present himself. Temple vs. Commonwealth, 77 Ky., 796."

Section 183, Criminal Code of Practice of Kentucky, provides:

"If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial. * * *"

In Temple vs. the Commonwealth, 77 Ky., 769, it is said:

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor."

In Allen vs. the Commonwealth, 86 Ky., 642, it is said:

"It is a rule of the common law that the trial of one charged with felony must be had in his presence. In Sperry's case, 9 Leigh, 623, it was said: 'The well established practice in England and in this State is that a prisoner accused of felony must be arraigned in person, and must plead in person, and in all subsequent proceedings it is required that he shall appear in person.' This is his right. Judge Cooley says: 'In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment.' (Cooley's 'Constitutional Limitations,' page 319.)"

In Wharton's "Criminal Pleading and Practice," Eighth Edition, Section 545, it is said:

"By the old common law form each juror is required to look on the prisoner and the prisoner on the juryman before the juryman is sworn. Nor can the prisoner's presence at this period be dispensed with or waived, in any case in which corporal punishment may be inflicted. Hence in felonies the record must show defendant to have been present at the arraignment."

Judge Brannon in his work, "The Fourteenth Amendment," page 271, says:

> "Principles of the common law and most of the Constitutions and statutes imperatively require, as an initial step, before any further one in the process of conviction of felony, that the accused shall be personally present to answer the indictment. He can not do so by counsel. He must be so present at every step when anything material to his interests is done in his case, down to and including final judgment."

In Lewis vs. the United States, 146 U. S., 370 (36-1012), it is said:

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

In Prine vs. the Commonwealth, 18 Pennsylvania, 103, it is said:

> "It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. Never has there heretofore been a prisoner tried for felony in his absence. No precedent case can be found in which presence is not a postulate of every part of the record.
>
> "He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what

he has to say why judgment should not be pronounced against him. These things are matters of substance, and not peculiar to trials for murder. They belong to every trial for felony at common law, because the mitigation of the punishment does not change the character of the crime. * * *

"What authority had the prisoner's counsel in this instance, on the ground or pretext of convenience, to waive their presence? In a criminal case there is no warrant of attorney, actual or potential; for where a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in court to do those things which his counsel could not do for him.

"It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable."

In Rolls vs. the State, 52 Miss. Reports, 396, it is said:

"We think the deduction from our own decisions, and the rule of safety, is to require the presence of the prisoner in all material and important steps taken during the progress of the cause. Of these are attendance during the impaneling of the jury, the delivering of the testimony, the rendition of the verdict, and the hearing of a motion for a new trial and in arrest of judgment, and when the sentence is pronounced."

In State (Mo.) vs. Smith, 90 Mo., 37, 59 American Reports, 4, it is said (Syllabus):

"The presence of a prisoner indicted for felony is necessary at the impaneling of the jury, and he may not waive the privilege, and his absence is not cured by the subsequent offer of the court to allow him to examine the jurors at the time of making peremptory challenge."

In French vs. State (Wisconsin), 21 Lawyers' Reports, Annotated, page 405, it is said:

"This is not only the indispensable right of the accused, but the record must show that he enjoyed that right, or it does not show that he had a legal and constitutional trial. In felonies the record must show the defendant to have been present at the arraignment and testing of the jurors."

In Samuel J. Anderson vs. the State, 2 Snead (Tenn.), the Supreme Court, by Judge Totten, says:

"In criminal cases, the grade of felony where life or liberty of the accused is in peril, he has the right to be present, and must be present, during the *trial* and until the final judgment. If he be *absent* either in prison or by escape, then there is a want of *jurisdiction* over his person to proceed with the trial or to receive the verdict or to pronounce the final judgment.

"This rule, founded in the justice and wisdom of the common law, is in substance reiterated in our Bill of Rights; it is necessary to the full and free exercise of the rights of the accused to make his defense; and in case he be legally convicted, that effect may be given on his person to the judgment of the court.

"2 Hawk P. C., 619.
"Co. Lit., 227 b.
"Raymond, 193, 2 Hale, 300.
"4 Bl. Com., 355-360, Bac. Ab., Verdict.
"B-1 Chittie, Cim. Law, 636.
"Clark vs. State, 4 Hemp R., 254.
"Bill of Rights, Art. 1, Sec. 9."

Lucius Witt vs. the State, 5 Coldewell's Reports (Tenn.), page 11, is even a stronger case to the same effect.

In Silas Gladden vs. the State of Florida, 12 Fla. Reports, 577, it is said:

"It is unnecessary for us to determine whether the prisoner can waive his right to be present during the trial, or whether a simple voluntary absence upon his part can be held to be a waiver of his constitutional right, and

authorize the State to proceed in his absence. These questions have been settled in this State.

"This court has laid down the rule very broadly, and has, perhaps, extended it beyond the views of the courts of some other States. In Holton vs. State, 2 Fla., 500, the court says: 'During the trial of a capital case (the whole trial), the prisoner has a right to be, and *must be, present. No steps can be taken by the court in the trial of the case in his absence. The prisoner charged must be present in court to make his objection to any* and every step that may be taken which he may deem illegal."

In Maurer vs. the People, 43 N. Y., page 1, it is said:

"The clause, 'during such trial,' as used in the statute, includes all proceedings had in impaneling the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, receiving and recording the verdict. * * * As the instructions were a proceeding in the trial, the statute forbade their being given in the absence of the accused. The presence of his counsel at the time, and his failure to object, was not a waiver. By no consent of the accused or his counsel can an indictment for a felony be lawfully tried in his absence, for the sufficient reason that the statute forbids it."

The case of Thompson vs. the State of Utah is a writ of error to the Supreme Court of the State of Utah, to review a judgment of that court affirming a judgment of the lower court of that State, convicting Thompson of the crime of grand larceny.

In that case, it is said:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given, or by his

silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

"In the case of Hopt vs. Utah, above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence. The court said: 'We are of opinion that it was not within the power of the accused, or his counsel, to dispense with the statutory requirement as to his personal presence at the trial.'"

The case of West vs. Louisiana, decided May 2, 1904, was brought to this court by writ of error to the Supreme Court of said State, to review a judgment which affirmed a conviction for larceny in the Criminal District Court of the Parish of Orleans in that State.

It is assigned as error that a certain act of the legislature of said State is unconstitutional as being in violation of the Fourteenth Amendment to the Constitution of the United States. Said act relates to the admissibility of evidence taken before the committing magistrate being read on final trial when the presence of the witness can not be procured.

It is also assigned as error that due process of law is denied by the introduction as evidence in a criminal trial, upon proof of non-residence and permanent absence, and inability to procure the attendance of the witness, of the deposition of said witness, taken upon the preliminary examination, before the committing magistrate, when defendant was present, and his counsel afforded an opportunity to cross-examine.

The Constitution of Louisiana provided that the accused shall have the right to be confronted with the witness, and it

also appeared that the State had adopted the common law rules of evidence in criminal cases, though its courts had repeatedly held that evidence taken as herein could be read.

This court held that—

"1. Whether the State court erred in its construction of the State Constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the State Court gives to its own Constitution and statutes and to the law which may obtain in the State, *under circumstances such as those existing herein.*" (Italics are ours.)

"2. At common law the right existed to read a deposition upon the trial of the defendant, if such deposition had been taken when the defendant was present, and when the defendant's counsel had had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness was, at the time of the trial, dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant. This much is conceded by counsel for plaintiffs in error, but they deny that the common law extended the right to so read a deposition upon proof merely of non-residence, permanent absence, and inability to procure the evidence of the witness upon the trial.

"There is some contrariety among the authorities and text writers whether, under the common law, a deposition is admissible in such case. Assuming, however, that the State court erroneousiy held what the common law was on the subject, we must, in order to reverse this judgment, go further, and hold that a trial thus conducted and a deposition thus admitted did not furnish due process of law to the accused; in other words, that the refusal to exclude this deposition (an error regarding the admissibility of evidence) took away from plaintiffs in error a right of such an important and fundamental character as to deprive them of their liberty without due process of law.

"The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If, through its courts, it erred

in deciding what the common law was, yet, *if no fundamental and absolutely all-important rights were thereby denied to an accused* (italics are ours), he still had due process of law, and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal Constitution.

"3. Coming to a decision of the question before us, we are of opinion that no Federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party, or to fundamentally impair those general rights which are secured to him by the Fourteenth Amendment. The accused has, as held by the State court in such a case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the State can not procure the attendance of the witness at the trial, and he is a non-resident and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.

"We say this with reference to the question whether the admission of the deposition fails to give the accused 'due process of law,' as provided for in the Fourteenth Amendment. As the Sixth Amendment does not apply to State courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case."

It seems to be clear that a State may change the law and rules of evidence.

In the Fourteenth Amendment, by Brannon, page 292, it is said:

"By parity of reasoning, the same principle applies under the Fourteenth Amendment. It was not designed to

deprive the States of its wonted and antecedent powers touching the law and rules of evidence in its courts deemed proper by it in the administration of justice."

The questions in this West case were, whether or not the enactment by the State of a statute *in conflict with the common law* which had been adopted by it, and, whether or not, under that statute, the admission of a deposition taken before the committing magistrate upon final trial, presented Federal questions.

The court held that on the question as to admissibility of evidence, where no fundamental right of the accused is violated, it is bound by the decision of the highest court of the State, and that in this case, the accused having once been confronted with the witness, to admit such depositions was but a slight extension of the rule of the common law, and sustained by the State courts, and did not violate any substantial fundamental right of the accused.

As shown, the State of Kentucky has adopted the common law, without change or modification of same applicable to the point at issue in the case at bar, and under said common law, it is well established that the accused must be present during the whole trial, INCLUDING THE IMPANELING OF THE JURY. That his right to so be present is inalienable, and his said presence is absolutely necessary in order to give the court jurisdiction to proceed with the case. His presence can not be waived by himself or counsel, or both. The Constitution and statutes of the State of Kentucky are but declaratory of this common law right and requirement, and the decisions of the courts of this State have repeatedly held that this is the law. The opinion in the case at bar so declares it, but affirmed the case, upon the sole proposition *that the presence of the accused was not required until the jury was sworn and jeopardy attached.*

The proposition herein IS NOT AS TO THE ADMISSIBILITY OF EVIDENCE, but the right of the accused to be present when any material thing is done or step taken, in the progress of the trial of his case, that affects his substantial rights—the right to be heard by himself and counsel.

The right to be present during the whole trial, including the impaneling of the jury, is a fundamental and absolutely all-important right, and is protected by the Fourteenth Amendment to the Constitution of the United States.

The common law fully sustains the contention of the plaintiff in error herein, as does also the Constitution and statutes of the State of Kentucky and the decisions of its courts, with one exception, and that is the opinion in the case at bar.

It is conceded that the State, at any time, may change its criminal law and modes of procedure, PROVIDED SUCH CHANGES DO NOT WORK A DENIAL OF THE SUBSTANTIAL AND FUNDAMENTAL RIGHTS OF THE ACCUSED. The decisions of a State are only evidence of what the laws are, and are not of themselves laws, and are, therefore, not binding upon this court.

In Baltimore & Ohio Railroad Company vs. Baugh, 149 U. S., 371 (37-774), it is said:

> "It is, however, contended that the thirty-fourth section of the Judiciary Act of 1789, Chapter 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply; that section provides, 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of

the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective or ill founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws."

Section 281 of the Criminal Code of Practice of the State of Kentucky has no bearing whatever upon the proposition here under discussion, as giving it its broadest possible construction, it does not embrace the error herein complained of.

Said Section 281 provides that a motion for a new trial shall not be subject to exceptions, but as held in Johnson vs. the Commonwealth, 77 Ky. (9 Bush), 225, this does not prevent an accused from excepting to the correctness of any error committed before or during the progress of the trial.

See also to the same effect, 79 Ky., 495, and Temple vs. Commonwealth, 77 Ky., 769.

The examination of Alexander in the absence of the accused was not excepted to, but that error could not be waived.

See Jacobi vs. Alabama, 187 U. S., 135 (47–107), *and was presented as a Federal question in the Court of Appeals and passed upon by said court.*

In the case of Chicago, Burlington & Quincy Railroad Co. vs. the City of Chicago, 166 U. S., 235 (41–984), it is said:

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court and

was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. United States vs. Cruikshank, 92 U. S., 542, 554 (23–588, 592); Leeper vs. Texas, 139 U. S., 462, 468 (35–225, 227). But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statutes prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.'"

Davidson vs. New Orleans, 96 U. S., 97, 102 (24–616, 619).

V.

When the absence of the accused during the trial is shown, the law presumes that his substantial rights have been prejudiced, and the holding of the Court of Appeals in this case, that the record must affirmatively show that said rights were not prejudiced, deprived the accused of his liberty without due process of law, and denied him the equal protection of the law.

In the case of Meece vs. the Commonwealth, 78 Ky., 586, it is said:

> "One charged with the commission of a felony can not be tried during his absence from the court, and when any step is taken during the trial, in the absence of the prisoner, the record must show affirmatively that he could in no wise have been prejudiced by it, else this court will reverse the judgment."

To the same effect see also—

Rutherford vs. Commonwealth, 78 Ky., 640.
Allen vs. Commonwealth, 86 Ky., 642.
Crowley vs. U. S., July 1, 1904, number, Advance Sheets of the Supreme Court Opinions, decided May 31, 1904.

This proposition is thoroughly considered heretofore in this case under the head of "Opinions of the Court of Appeals of Kentucky."

VI.

ABUSE OF DISCRETION IN DISCHARGING JUROR AFTER ACCEPTED.

That the court, in discharging juror J. C. Alexander, after he had been accepted on the jury, without cause therefor, acted beyond its power, and that the Court of Appeals of Kentucky, in holding that by reason of Section 281 of the Criminal Code it could not reverse on account of said error, deprived the accused of his liberty without due process of law and denied to him the equal protection of the law.

In this case at bar, eleven jurors had been tested and accepted by both the Commonwealth and the defendant, and were in the jury box, waiting to be sworn when the panel was completed, when the Commonwealth's attorney came into court, and, in the presence of the accused and his coun-

sel, stated that he had a matter that he desired to bring to the attention of the court, *away from the presence of the jury*, and thereupon the court and counsel for the Commonwealth and defendant and his counsel retired to the county judge's office, and the attorney filed the affidavit of Ben Hackett, and for reasons therein stated moved the court to discharge juror J. C. Alexander, who was one of the eleven jurors accepted, to which defendant, by counsel, objected.

The reasons stated in the affidavit of said Hackett were two:

"1. This affiant, Ben Hackett, says that, after the killing of William Goebel, he and Mr. J. C. Alexander, who had been accepted on the jury to try said case, had many conversations and arguments about the said killing, *this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him.* (Italics are ours.)

"2. This affiant further says that on yesterday afternoon, late, after Mr. Alexander had been accepted as a juror to try the case, and after the affiant had been excused—after those accepted as jurors had been charged and admonished by the court, and immediately after the adjournment for supper, and as the jury was being conducted by the sheriff away from the courthouse, affiant, by accident, met the jury as they were passing through the courthouse yard, when, in passing, Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'"

Said Hackett had been summoned and called *and had qualified himself in said case as a juror*, and thereupon the defendant, by counsel, challenged him for cause, and the court overruled the challenge, and then defendant challenged him *peremptorily*, and the court stood him aside.

Argument was heard on both sides on said motion to discharge juror J. C. Alexander, and—

> "It was agreed *by counsel* on either side, that the court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, *that he said to said Hackett while in the custody of the sheriff*, '*Hello Ben, I am glad they cut you off this jury, as I did not want to serve on this jury with you*' (italics are ours), and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that *such conduct* on the part of Alexander was a violation of the admonition of the court *when he was placed in the custody of the sheriff*, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged, and this court, being *thus advised* (italics are ours), overruled defendant's objection, and discharged and excused said Alexander, and defendant, by counsel, excepts. Thereupon, the defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court, being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel excepts." (Printed record, pages 32-33).

It thus clearly appears that the court in acting upon the motion to discharge Alexander did not inquire into or consider the "First Reason" stated in said Hackett's affidavit, and why it was not considered is too apparent to require comment.

The record shows that the "*agreement*" referred to was made "*by counsel on either side;*" as a matter of fact, however, the accused was present when it was so made.

The intimation in the opinion of the Court of Appeals herein, that the examination of Alexander was conducted

privately by the court, *at the request of counsel for appellant*, made in the latter's presence and with his consent, *is not warranted by the record, and counsel did not and does not deem it necessary or proper to raise an issue* as to a statement that can not be properly considered by the court; the only suggestion of privacy made as shown by the record was by the honorable attorney for the Commonwealth, excepting, of course, the agreement entered into.

In the opinion herein it is also said (printed record, page 67):

> "As what occurred in the privy examination of Alexander does not appear in the bill of exceptions, we are unable to know whether he admitted or denied the statements made in the affidavit of Hackett, except that it does not appear in the bill of exceptions that he made the admission—presumably before the privy examination—that he said to Hackett, after the latter had been excused from the jury, and he had been accepted as a member thereof, 'Hello, Ben! I am glad that they cut you off of this jury, as I did not want to serve on this jury with you,' but claimed that it was made in a jocular way.
>
> "It is insisted for the Commonwealth that Alexander's admission as to the above statement warrants the conclusion that what was said in the affidavit of Hackett, as to arguments between Alexander and himself involving the merits of this case, is true, otherwise what reason did Alexander have for not wishing to serve with Hackett on the jury?
>
> "In this view of the matter, it is argued that the action of the lower court, in discharging Alexander from the jury, was not an abuse of discretion."

The record shows that it was agreed that the court should examine Alexander only as to the statements said to have been made by him to Hackett *while Alexander was in charge of the sheriff;* this statement the bill of exceptions shows that Alexander admitted he made, and for this, *and this alone*,

said bill of exceptions shows that the court excused Alexander. The statement in said bill of exceptions (printed record, page 32) in reference to this matter is as follows:

> "It was agreed by counsel on either side that the court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to said Hackett, while in the custody of the sheriff, 'Hello, Ben, I am glad they cut you off this jury, as I did not want to serve on this jury with you,' and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the court when he was placed in the custody of the sheriff, it was ordered and adjudged that the said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged."

The case of Max Klinger vs. State of Missouri, 80 U. S., 263 (20-635), is one where plaintiff in error sought a reversal upon the grounds that the court excused a juror over the objections of the defendant, after he had been *accepted, but before he was sworn*, because he would not take what was known as the "test oath."

The juror assigned as his reasons for not taking the oath—

> "That during the late Rebellion he was a sympathizer with the Confederate cause, and earnestly desired its success; that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the South, that his heart was with the Southern cause, and that for these reasons he could not conscientiously take the proffered oath."

The court said:

> "Now, it does not clearly appear from this statement there made that the juror was discharged 'for no other

reason than that he declined to take the oath.' The reasons assigned by him for not taking the oath were two-fold; first, that he was a rebel in his sympathies during the war, and second, that he was so still, and even stronger than ever. A man who makes such an avowal as that, thus manifesting a settled hostility to his country and its government, may well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws. Had the juror refused to take the oath simply because he had sympathized with or aided the rebellion during the war, and had he been discharged on that account, then the questions would have fairly arisen of which this court could take cognizance. The repugnancy of the test oath, to President Johnson's proclamation of amnesty, and to the prohibition against *ex post facto* laws, etc., would have been fairly brought into question. But as he also refused to take it because he was still a more bitter rebel than ever, the avowal of such a feeling was inconsistent with the upright and loyal discharge of his duties, as much so as if he had expressed his disbelief in the obligation of an oath, and had declined to take it for that reason. Surely, if he had done that, there would have been no doubt that his discharge was justifiable, whatever view might be taken of the constitutionality of the test oath. It certainly would have been in the discretion of the court, if not its duty, to discharge him, and so we think it was in this case.

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which might raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground—and it appears that the court did, in fact, base its judgment on such independent ground—and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based

was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction. *Magwire vs. Tyler*, 8 Wall., 650 (75 U. S. XIX, 320); Neilson vs. Lagow, 12 How., 110; R. R. Co. vs. Rock, 4 Wall., 177 (1 U. S., XVIII, 381); R. R. Co. vs. McClure, 10 Wall., 511 (77 U. S., XIX, 997); Ins. Co. vs. Treas. (ante 112); Cromwell vs. Randall, 10 Pet., 368; Suydam vs. Williamson, 20 How., 427 (61 U. S., XV, 978); Williams vs. Oliver, 12 How., 123.

"In this case, it appears that the court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear but that he was discharged for that ground. It can not, therefore, with certainty, be said that the Supreme Court of Missouri did decide in favor of the validity of the said clause of the State Constitution, which requires a juror to take the test oath.

"Therefore the writ of error must be dismissed."

In this Max Klinger case it was held that it did not appear upon which ground the court excused the juror, and that therefore, as the independent ground was a good one, it is presumed that he was excused on that ground, and that therefore this (U. S. Supreme) court could not take jurisdiction.

In the case at bar, however, while two grounds for excusing the juror were presented by the affidavit of Ben Hackett, it is clearly and unmistakably shown by the bill of exceptions, *that only one of them was inquired into or considered*, that is, what he said to Ben Hackett *while he, Alexander, was in charge of the sheriff*, and it is also shown *that the court in excusing him acted solely upon this ground stated*, and for plaintiff in error it is contended that this ground furnished *no cause whatever* to justify the court in excusing said juror. Said juror had been tested and accepted by both the Commonwealth and the accused, and under this state of facts the

Criminal Code of the State of Kentucky, Section 215, provides:

"The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins."

Section 250:

"If, after a juror has been accepted, but before the jury has been completed, one of the accepted jurors becomes so sick as to prevent the continuance of his duty, the court may excuse such juror, and complete the formation of the jury as if he had not been originally accepted."

Section 251 provides:

"If, after retirement, one of the jurors becomes so sick as to prevent the continuance of his duty, or other accident or cause occur, preventing them being kept together, or if, after being kept together such a length of time as the court deems proper, they do not agree in a verdict, and it satisfactorily appears that there is no probability they can agree, the court may discharge the jury; or if the sickness of the juror be temporary, the court may permit him to separate from the other jurors and may place him in charge of an officer, or not, in its discretion."

This section was originally Section 248, and is so referred to in decisions hereinafter cited.

Section 252 provides:

"In all cases, if a jury be discharged, either in progress of a trial or after the cause is submitted to them, the cause may be again tried at the same or another term of the court."

Section 202, which relates to challenges, provides:

"It must be taken before he is sworn in chief, unless the court, for good cause, permit it to be taken at any time before the jury is completed."

Section 281 of the Code of Practice provides:

"The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exceptions."

These are all the provisions of the code bearing upon the question under consideration.

The construction of Section 215 is well settled by the courts of this State.

In the case of Munday vs. The Commonwealth, 81 Ky., page 233, it is said:

"Appellant, being indicted for manslaughter, was convicted and sentenced to confinement in the penitentiary for the term of four years.

"One of the errors assigned is, that the court refused to permit him to challenge peremptorily W. R. Holdy, and ruled that the case should be tried with him as one of the jury.

"It appears from the bill of exceptions that the names of twelve jurors having been drawn, who, upon examination, were found qualified, the court notified the Commonwealth's attorney and defendant that they could then pass upon the jury and challenge peremptorily such of them as they desired to do, but that, in case they failed to challenge any of the number, such person on the panel as had not been challenged would be regarded as accepted; to which ruling the defendant excepted at the time.

"Thereupon the Commonwealth, having declined to challenge any of the twelve so presented, the defendant challenged peremptorily seven of the number, but did not accept the five remaining jurors, though he refused to challenge either of them. The clerk then drew from the panel of the remaining regular jurors the names of seven others, including Holdy, found to be qualified. The Commonwealth again declining to challenge, the defendant challenged peremptorily five of the seven, leaving Holdy and one other not challenged. Five bystanders were then duly summoned and found to be qualified, all but one of

whom were challenged peremptorily by the Commonwealth. The panel was again filled, when one of the five was challenged by the defendant. Another one was then summoned, whom both parties declined to challenge; but appellant then offered to challenge peremptorily Holdy, which the court refused to permit.

"Whether the court erred or not in this ruling must be determined by the Criminal Code, the sections thereof relating to this subject being as follows:

"'SEC. 191. When an error of fact in a criminal prosecution is about to be tried, the clerk shall draw, in the manner directed by the General Statutes, the names of twelve jurors, who, if not challenged by the parties, nor excused by the court, shall compose the trial jury.

"'SEC. 192. When a juror is excused, or challenge to a juror sustained, the clerk shall draw the name of another juror to fill the panel, until the list of standing jurors is exhausted, when the court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury, to be summoned by the sheriff, and the panel shall be filled, from time to time, from the jurors so summoned, and if they be exhausted, similar orders may be made for summoning other jurors until the jury is completed.'

"'SEC. 201. The challenge to the individual juror is either (1) peremptory or (2) for cause.

"'SEC. 202. It must be taken before he is sworn in chief, unless the court, for good cause, permit it to be made at any time before the jury is completed.'

"'SEC. 215. The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenge to each juror before the other begins.'

"Under the code, each party is entitled to have a full panel of twelve jurors, found, upon examination, qualified to try the case, before being required to exercise the right of challenge to the individual juror; and whenever the number is lessened by challenge of either party, the panel must be again filled before being passed on, and so on until the jury is completed.

"But it was not intended that either party, having accepted the whole or part of the panel, or what is equivalent, having declined to challenge when duly called on by the court to pass upon them, should be

permitted, at a subsequent stage in the formation of the jury, to again pass upon and challenge the same jurors.

"There is but one construction that can be properly given to Section 215. When a full panel of qualified jurors is presented, the Commonwealth must then either accept or challenge. Having accepted, or declined the challenge, the challenges as to those then passed on are, in the language of the code, exhausted. Or having challenged one or more, the others must be accepted or considered.

"If this be not the case, then the formation of the jury may be indefinitely suspended, or else the defendant would, in violation of the plain language of that section, be required to begin before the Commonwealth had exhausted her challenges to the individual jurors of the first panel.

"The right of challenge is to be exercised by the Commonwealth and by the defendant in the same manner and upon the same conditions, the only difference being as to the number of peremptory challenges allowed to each. The defendant as well as the Commonwealth is therefore required to exhaust his challenges to each juror of a panel when presented to be passed upon. Otherwise, when the panel is filled the second time, the Commonwealth would be required to begin before the defendant had exhausted his challenges to the jurors of the first panel.

"In this case Holdy, as one of a full panel of qualified jurors, was duly presented for the acceptance or challenge of both the Commonwealth and the defendant, and not objected to or challenged by either, until after twelve jurors, found qualified, had been passed upon, when, for the first time, appellant offered to challenge him peremptorily.

"If he had the right at that stage of the proceedings to peremptorily challenge him, he had the same reserved right to challenge each of the other eleven, and to continue the tedious process of challenging one by one the jurors already passed on to the number allowed him by law; and if the defendant could thus delay the proceedings and trifle with the court, so might the Commonwealth's attorney.

"Properly construed, Section 202 is not inconsistent with Section 215 as we have interpreted the latter. Both sections require the challenges to the individual juror to be taken before he is sworn in chief, that is, sworn to try the issue, which, as provided in Section 217, must be done when the 'jury, consisting of twelve qualified jurors, shall have been duly empaneled.' But, as provided in Section 202, the court may, for good cause, permit the challenge to the individual juror to be taken at any time before the jury is completed, or, in other words, before the jury is duly empaneled; the words, 'for good cause' being obviously used in a different sense from 'cause' as contradistinguished from 'peremptory.'

"In this case no good cause is shown for permitting appellant to challenge the juror he previously, at the proper time, passed on, or had the opportunity to pass on; and hence the court did not err in refusing to make in his favor an exception to the rule that 'each party must exhaust his challenges to each juror before the other begins.'"

In Wiggins vs. Commonwealth, 104 Kentucky, page 766, being an indictment for murder, decided 1898, it is said:

"Another objection is that, after a juror had been accepted by the Commonwealth and not challenged by the defense, the defense was not permitted, when the panel was filled, to peremptorily challenge such juror. This seems to us to be specifically provided for by Criminal Code, Section 215, which requires that each party must exhaust his challenges to each juror before the other begins; and this has been construed in Munday vs. Commonwealth, 81 Ky., 237, where, in an opinion by Chief Justice Lewis, it was held that 'the defendant, as well as the Commonwealth, is therefore required to exhaust his challenges to each juror of a panel when presented to be passed upon.' This ruling was, therefore, not error."

In Smith vs. Commonwealth, 20 Kentucky Law Reporter, p. 1848, decided 1899, marked "Not to be reported," it is said:

"It is the contention of appellant that the court erred in requiring him to accept or reject the individual jurors

as they were called before a panel of twelve were found qualified under the law to sit in the case, and it appears from the bill of exceptions that the court did require the appellant to accept or reject each juror as he was called and found qualified.

"Section 215 of the Criminal Code reads as follows: 'The challenges to the jury shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenge to each juror before the other begins.'

"This court, in Shelby vs. Commonwealth, 91 Ky., 566, in discussing and construing the foregoing section, said: 'After the twelve men had been proven competent jurors upon *voir dire* examination, and before they were sworn to try the issue, the defendant claimed the right to challenge, without cause, two of the jurors, and the court refused to permit this to be done, because, as is stated, defendant had already accepted them, and it was too late for a peremptory challenge. This might have been sanctioned under the former practice, but this court, in construing the provisions of the Criminal Code on this point, has repeatedly held that the right to challenge without cause arises when there are twelve men in the box competent to try the case. It is true that this may be waived, but it is not waived by an examination of the individual juror, either by the Commonwealth or the accused, as to his fitness to try the cause. Have you formed or expressed an opinion as to the guilt or innocence of the accused; and, if so, is that opinion based upon the testimony, or from statements made by those who were present and familiar with the facts attending the commission of the offense? This is one of the preliminary questions, and if answered in the negative the juror is told to take his seat, and when twelve competent men are in the box then the right of challenge without cause begins. When a full panel of qualified jurors is obtained, the Commonwealth must accept or challenge. If the Commonwealth declines to challenge, the jurors are passed to the defendant. (Munday vs. Commonwealth, 81 Ky., 233; Jenkins vs. Commonwealth, 9 Ky. Law Rep., 254.)

"'The court below, therefore, erred in refusing the peremptory challenge to the two jurors, and for that reason the judgment must be reversed.'

"It seems clear from the code, as expounded by the decision *supra*, that, in selecting a jury for the trial in cases of felony, twelve qualified jurors should be selected and presented, and that it is then the duty and privilege of the Commonwealth to accept or challenge as provided by law, and so many as are not challenged shall be deemed to have been accepted by the Commonwealth, and when there are twelve qualified jurors so passed upon by the Commonwealth the defendant must then accept or challenge, and so many as he does not challenge shall be held to be accepted by him; and if any be challenged their place shall be filled and passed on in like manner by the Commonwealth and then by the defendant, and so on until the panel is completed or challenges exhausted. It, therefore, follows that the court below erred in requiring defendant to accept or challenge each individual juror as presented and found qualified.

"It is true that Section 281 of the code provides that the decision of the lower court upon challenges to the panel and for cause, upon a motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exceptions. But that section has no application to the mode of selecting and empaneling the jury."

In Colvin vs. Commonwealth, 22 Ky. L. Rep., page 1408, which case was decided in 1901, and is marked "Not to be reported," it is said:

"Appellant was indicted and tried for the murder of one Coulter, resulting in a verdict and judgment of conviction, fixing his punishment at ten years' confinement in the penitentiary. On this appeal he complains of two alleged errors.

"The first is, that the trial court should have allowed him to challenge peremptorily the juror S. G. Cull, and under the following circumstances: After twelve jurors had been found qualified upon *voir dire* examination, the

Commonwealth peremptorily challenged five of them, whereupon their places were filled with five others who passed similar preliminary examination. The completed panel was then tendered by the court to the Commonwealth, who accepted the jury as formed. The court thereupon tendered the panel to appellant, who, by his counsel, after consultation, peremptorily challenged four of the jurors. As they stepped aside from the jury box, the Commonwealth's attorney, in the hearing of the court, requested the sheriff to 'fill the box,' and the court requested the eight jurors remaining to take seats together, so as to leave the four vacant seats together, it is presumed. Appellant's counsel upon his suggestion, again consulted, they say, for two minutes, and before any of the four additional jurors had taken their seats or been examined, appellant offered to challenge another of the eight jurors. Upon objection by the Commonwealth, this offer was overruled, and he excepted.

"Section 215 of the Criminal Code provides: 'The challenges of the juror shall first be made by the Commonwealth and then by the defendant, and each party must exhaust his challenge to each juror before the other begins.'

"This section we construe in Munday vs. Commonwealth, 81 Ky., 233, to mean that 'when a full panel of qualified jurors is presented the Commonwealth must either accept or challenge. Having accepted or declined to challenge, the challenges as to those then passed on, are, in the language of the Code, exhausted. Or, having challenged one or more, the others must be considered as accepted. * * * The right of challenge is to be exercised by the Commonwealth and by the defendant in the same manner, and upon the same conditions, the only difference being as to the number of peremptory challenges allowed to each.'

"Appellant argues that he had not completed the act of challenging the juror, and, as evidence of that, cites the length of time between his challenge of the four and the further offer, the act of further consultation with his counsel, three in number, and the further fact that no other juror had been presented for examination. But neither one nor all of these facts are in any wise inconsistent with the previous acceptance of the juror by

appellant. If he had expressly accepted the juror, within less than two minutes he could have changed his mind, and that upon, or without, consultation with his counsel. And it may have been not only minutes, but hours before the sheriff could have presented other qualified talesmen for examination. Yet, it could scarcely be argued that a previous acceptance of a juror by the defendant would not have been binding on him unless other jurors had appeared to fill the panel. The question, then, reverts, did, or did not, the appellant accept the eight jurors by his conduct above described?

"It must be presumed that appellant's able counsel were familiar with the construction given Section 215, *supra*, in the Munday case, and must have been aware that challenging four of a panel, and saying nothing as to the remaining eight, was, by clear implication, an acceptance of the eight, as much so as if they had expressly announced such acceptance. They were not hurried by the court into making any announcement concerning the panel, but were given full opportunity, so far as this record discloses, for consultation before determining which of the jurors should be challenged. Their conduct, the common practice in such cases, and what occurred, were as clearly an acceptance of the eight as if that fact had been announced in express terms. Having, therefore, accepted the jurors, was it error for the court to decline to allow further peremptory challenges as to those accepted?

"Section 202, Criminal Code, provides as to when challenges to the juror must be taken, as follows: 'It must be taken before he is sworn in chief, unless the court, for good cause, permit it to be made at any time before the jury is completed.'

"Construing this section, in Munday vs. Commonwealth, *supra*, we held: 'The court may, for good cause, permit the challenge to the individual juror to be taken at any time before the jury is completed, or, in other words, before the jury is duly empaneled; the words, "good cause," being obviously used in a different sense from "cause," as contradistinguished from peremptory.'

"No good cause having been shown to the court before the final empaneling of the jury, for permitting the

exception in favor of appellant's motion to challenge the juror Cull, it follows that the court did not err in overruling his motion."

Section 250 gives the court the right to excuse a juror after he has been accepted and before the jury is completed, if, by reason of sickness, the juror is unable to serve.

Section 202 permits a challenge to be made for "*good cause*" at any time before the jury is completed.

In Munday vs. the Commonwealth, 81 Ky., 233, it is said:

"Properly construed, Section 202 is not inconsistent with Section 215 as we have interpreted the latter. Both sections require challenges to the individual juror to be taken before he is sworn in chief, that is, sworn to try the issue, which, as provided in Section 217, must be taken when the jury, consisting of twelve individual jurors, shall have been duly empaneled, but, as provided in Section 202, the court may, for good cause, permit the challenge to the individual juror to be taken at any time before the jury is completed, or, in other words, before the jury is duly empaneled; the words 'good cause' being obviously used in a different sense from 'cause,' or as contradistinguished from 'peremptory.' In this case no good cause was shown for permitting appellant to challenge the juror he previously, at the proper time, passed on, or had the opportunity to pass on, and hence the court did not err in refusing to make in his favor an exception to the rule that each party must exhaust his challenges to each juror before the other begins."

If a challenge is made to a juror after he has been accepted, it must be for "GOOD CAUSE," and the trial court does not finally determine this matter, as, in Smith vs. the Commonwealth, 20 Ky. Law Reporter, page 1848, it is said:

"It is true that Section 281 of the code provides that the decisions of the lower court upon challenges to the

> panel and for cause, upon a motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exceptions. But that section has no application to the mode of selecting and empaneling the jury."

And it may also be properly added that this section does not apply to the discharge of a juror after he has been accepted by both the Commonwealth and the accused.

If the court discharge a juror after he has been accepted without "cause," or without "good cause," the accused is thereby deprived of due process of the law, and denied equal protection of the law.

In this case at bar (printed record, page 68) it is said:

> "It is, however, beyond our province to reverse this case for error, if there were any, in excusing Alexander from the jury. Our right to do so is expressly forbidden by Section 281 of the Criminal Code."

And said opinion cites Curtis vs. the Commonwealth and Turner vs. the Commonwealth.

By an examination of these cases it will be seen that they, and all others referred to, relate to challenges made before the jury has been accepted. Such challenges may be made with or without cause, but when a juror has been accepted the accused is entitled to be tried by him, and the court can not then excuse him except for "good cause," that is, such cause as would justify the court in discharging him during the trial, after being sworn.

Former jeopardy does not attach until the jury is sworn, but by the acceptance of a juror by both the Commonwealth and the accused, a right is thereby created and vested in the accused that can not be violated at the discretion of the court. If it were not so, then the right of trial by jury would be of little value, as the court could arbitrarily stand aside any juror

the accused might accept, until such jury as was satisfactory to the Commonwealth or the court was selected.

Section 281 is no more intended to embrace this state of facts than that wherein the court discharged a juror after the jury had been sworn, and in that case an *absolute necessity* must exist or arise to authorize the court to interfere with the jury sworn, otherwise a plea of former jeopardy is good, and, as said, in a case where the juror has been accepted, while such interference could not sustain the plea of former jeopardy, it would be such a violation of the rights of the accused as would demand the protection under the provisions of the Fourteenth Amendment. The right to challenge is the right to reject, but when a juror has been accepted he can not be discharged except for "*good cause.*"

As to the interference with the juror after the jury has been sworn, in the case of O'Brian vs. the Commonwealth of Kentucky the court has very fully considered this question.

In O'Brian vs. Commonwealth, 72 Kentucky (9 Bush), page 333, it is said:

> "Murty O'Brian was indicted by a grand jury of the county of Hickman, on the 27th of March, 1872, for the murder of Tim Hogan. He appeared in answer to the charge, pleaded not guilty, and also filed a special plea, that of former jeopardy; the trial resulting in a verdict of guilty, and a judgment thereon sentencing him to be hanged. This appeal is from the judgment. The accused complains of many errors committed to his prejudice during the progress of the trial in the court below, the most of which are deemed merely technical, and we will, therefore, proceed to the consideration of the grave and important question involved in the case. It seems that the accused had been indicted for the same offense by a grand jury of the same county in the year 1868, and upon his appearing to answer the charge pleaded not guilty, and a jury was selected and sworn in accordance with the law, and the accused legally and

regularly put upon his trial. Witnesses were introduced on the part of the Commonwealth, whose testimony conduced to connect the accused with the killing of Hogan, and while a witness was being examined by the prosecution, one of the jurors (Spilman) announced from the jury box that he was a member of the grand jury that had found and returned into court the indictment upon which the prosecution was based; and thereupon the court, of its own motion, and against the objections of the accused and his counsel, discharged this juror, and had another summoned in his stead. The trial then progressed, resulting in a verdict of guilty. The case was brought to this court and reversed, and upon its return to the lower court, the indictment having become mutilated, a new indictment was found, the same under which this conviction was had, and to which the special plea was filed, containing in substance the facts above recited. These facts are all made to appear in the present record, the bill of evidence on the former trial forming a part of the bill of evidence in this case. * * *

"The discretionary power of courts over juries in capital cases has been greatly enlarged in many of the States in the Union, and in some it is held that while judges must be extremely cautious in interfering with the chances of life in favor of the prisoner, still in the exercise of their discretion they have the right to discharge the jury, and the only security the prisoner has is in the conscientious exercise of this power and the responsibility of the judges under their oaths. That courts have the power to discharge juries in criminal causes where the accused is even charged with a capital offense, and that without the prisoner's consent, is now too well settled to be doubted; but whether the exercise of this power is to be determined at the mere will of the judge, or only in cases of absolute and extreme necessity, is a question in regard to which we find many conflicting authorities.

"Section 211 of the Criminal Code provides that a challenge for implied bias may be taken where the juror was a member of the grand jury that found the indictment, but in no wise disqualifies him unless challenged by the parties to the indictment. When the fact is disclosed showing this implied bias, if the accused fails to

object or ask a discharge of the jury, it is a waiver of his right, and, as decided by this court in the case of Fitzpatrick vs. Norris, he can not afterwards for this cause avoid the verdict or obtain a new trial. The accused, however, in this case, after having once accepted the juror, was still willing to be tried by him, and protested against the action on the part of the court in discharging him by excepting to the ruling; and the court, disregarding his objections, required the trial to progress after the substitution of another juror.

"Section 248 of the Criminal Code provides 'that if after retirement one of the jurors becomes so sick as to prevent a continuance of his duty, or other accident or cause occur preventing them being kept together, or if, after being kept together such a length of time as the court deems proper, they do not agree on a verdict, and it satisfactorily appears that there is no probability they can agree, the court may discharge the jury.'

"Section 249 (now 252) provides 'that in all cases where a jury is discharged, either in the progress of the trial or after the cause is submitted to them, the same may be again tried at the same or another term of the court.'

"It could not have been intended by the section *supra* (248) that the power of the court to discharge a jury in cases of necessity is restricted to the causes enumerated in that section; if so, all other causes arising during the progress of the trial showing a clear and manifest necessity for the discharge of the jury must be disregarded. This section of the code, in our opinion, was not intended to define all the causes upon the happening of which this power could be exercised, but was only intended as an adoption of the legal rule that a case of actual necessity must exist before a jury can be discharged.

"Section 249 was intended to apply to such cases as are mentioned in Section 248, and has direct reference to the latter section; but giving to Section 249 of the code its most comprehensive meaning, and placing this right to discharge a jury, by its provisions, at the sole discretion of the judge, it is still argued that its exercise without any legal necessity is an infringement upon the constitu-

tional rights of the citizen. The accused had the right, under the Constitution and laws of the State, to a fair and impartial trial of his case by a jury of twelve men, selected and sworn according to law, and when thus selected and chosen by him, it was their province to render, and his right to demand, a verdict as to his guilt or innocence of the offense charged. The withdrawal of the juror Spilman, against his objection, terminated the legal existence of the jury sworn to try the issue between him and the Commonwealth, a jury to whom he had been delivered in charge, and at whose hands he had the legal right to expect a safe deliverance. There was certainly no legal reason or necessity for discharging Spilman from the jury. He was a competent juror, although a member of the grand jury that returned the indictment into court. He had been accepted by both the Commonwealth and the accused, and nothing but his death, sickness, or some accident preventing his continuance on duty, authorized the court, without the consent of the accused, to say that he should no longer constitute one of the panel. What the verdict of the jury might have been with Spilman upon it, is left altogether to conjecture; yet the accused was entitled to a verdict from him, in conjunction with his fellow jurors, and the court had no legal power to deprive him of this right. Section 14 of Article 13, State Constitution, provides 'that no person shall, for the same *offense be twice put in jeopardy of his life or limb.*'

"A similar provision is also made part of the Federal Constitution and that of almost every State in the Union. The right of trial by jury is of but little value to the citizen in a criminal prosecution against him if this provision of the Constitution can be violated and the accused left without remedy. If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the State demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right? It will not do to say to the accused that his only protection is in the sound discretion of the judge, or in the responsi-

bilities assumed by him in taking the oath of office. As remarked by Justice Tilghman in the case of the Commonwealth vs. Cook (6 Sergeant & Rawle), 'In the state of purity and independence in which I verily believe the judiciary of the several States, as well as of the United States, at present stands, there might be no danger of oppression from the enjoyment of a very large discretionary power as to the discharge of juries; but other times may come, in which judges may abuse this discretion,' etc. Gibson, Justice, in the case of the Commonwealth vs. Clue (3 Rawle, 488), said: 'Why should it be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offense, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the abuse of it but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the Constitution is guarded by sanctions more imperative. A right which depends on the will of the magistrate is essentially no right at all, and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules.'

"While the integrity of the judiciary of this country has always been maintained, still we are satisfied the surest protection to the citizen, when upon trial for a capital offense, upon such a state of facts as appears in this case, consists in the constitutional guaranty that he shall not be twice put in jeopardy of life or limb for the same offense. If the judge has the legal right to discharge the jury in a case like this, he may also discharge it on account of the absence of a witness for the prosecution, or in every instance and as often as the testimony is deemed insufficient upon which to base a conviction, and subject the accused to the same mode of trial as pertains to every civil action. * * * While it must be maintained that some cause should intervene that of necessity compels the discharge of the jury, still we think it quite difficult to designate all the causes that would legally justify such action on the part of the court, and

can only reaffirm the principle embodied in all the cases referred to, and which, in our opinion, is also the doctrine of the common law, that every interference on the part of the State, after the jury has charge of the prisoner, by which the accused is prevented from having a verdict declaring his guilt or innocence, unless upon facts clearly establishing a case of necessity, or showing the prisoner's consent, must operate as an acquittal, and this is the only mode of preserving and maintaining the constitutional provision on this subject. * * *

"It will be found, upon a careful examination of all the authorities in conflict with the views here presented that the opinions have been delivered in almost every instance in cases of misdemeanors, where it is admitted the court, as in civil cases, can exercise a sound discretion in the discharge of the jury, and in cases involving the liberty of the accused, the judgments affirming the action of the lower court in discharging juries have been rendered in cases showing an absolute necessity on the part of the court in ordering a new panel. There is no case to be found where the citizen has been placed upon trial for murder and the jury discharged without his consent, and without legal cause, where a doctrine contrary to the views herein expressed has been announced. * * *

"The judgment of the court below is reversed; and as the verity of the record of the former trial is admitted by the State, the court below is directed to discharge Murty O'Brian from custody."

The reason given by the court for discharging Alexander is, in effect, that he was guilty of contempt *in speaking to Hackett about his having been excused.* Not that he talked of the case or its merits, but was merely joking with Hackett in the presence and hearing of the sheriff and of the other jurors. This certainly could not constitute even the slightest pretext for discharging Alexander, much less constituting a "good cause" for doing so.

In the opinion, however, it is said that it is insisted on behalf of the Commonwealth that this remark of Alexander

showed that he had had the previous conversations referred to in Hackett's affidavit, and here designated as the first reason stated therein. This contention can certainly have no weight in this case, because it is shown by the bill of exceptions as stated, that the court did not consider this previous conversation which Hackett said he had had with Alexander, but, upon the contrary, entirely eliminated same from the case, and the court specifically says that, "said Alexander having admitted the truth of said statement, but claiming said statement was made in a jocular way, and the court being of the opinion *that such conduct on the part of Alexander* was a violation of the admonition of the court when he was placed in the custody of the sheriff, it is so adjudged that said Alexander be and he is now excused as a juror in this case, and he is now ordered to be discharged."

And the court, "*being thus advised*," overruled defendant's objection and discharged and excused said Alexander.

If the court had been of the opinion that the talk with Hackett was a violation of the admonition, then the court had the right, either then or after the conclusion of the trial, to punish said Alexander as in case of contempt, but it is submitted that the court had no right, by reason of something that did not and could not disqualify Alexander as a juror, to deprive the defendant of his services upon said case.

Suppose said Alexander had said to Hackett before either one of them had been selected upon said jury, "I am in hopes they will discharge you, as I do not want to serve with you on that jury," and this fact had been made known to the court under a challenge for "cause" before said Alexander was accepted, can it be contended for a moment that the challenge would have been sustained ?

As said, in considering this case, the first reason stated by Hackett in his affidavit, that is, a prior conversation with Alexander, must be entirely eliminated from this case. The court recognized the untruthfulness of the statement and insinuation contained therein, and in substance has said, and only said, that for the violation of the admonition, in speaking to Hackett, said juror must be excused. Then, under this state of facts, the case resolves itself into one where the court without "cause," or without "good cause," has excused an accepted juror, and deprived the accused of his services and thus violated his rights.

The direct question here involved seems never to have been but once considered by the courts of this State, and that was in the case of Shelby vs. The Commonwealth, 91 Ky., 566 (1891). In that case it is said:

> "After the panel had been filled, but before the jury was sworn to try the issue, affidavits were filed by the attorney for the State to the effect that one of the jurymen had formed and expressed an opinion from having heard the evidence, or the statements of those familiar with the facts. The entire jury was then discharged, and an order made directing the sheriff to summon twenty-four jurors, including among the number the eleven jurors who had been discharged. To this the defense objected. While the eleven jurors were doubtless impartial men, it would have been proper, under the circumstances, to have had an entire new panel, as the facts developed in relation to the one juror may have made an unfavorable impression on the minds of the remaining eleven."

In the case at bar, after the court excused J. C. Alexander as stated, the defendant moved that the remaining panel be discharged. The court overruled said motion, *to which the defendant excepted.*

The refusal to consider this exception occurred first in the Court of Appeals, and therefore, same could not be presented as a Federal question at an earlier stage in the case.

There seems to have been no case decided in this State construing said Section 281 as to whether or not it applied where the court excused the juror after he was accepted, but the only construction thereof that has been made is as stated, where the juror was challenged at the proper time before he had been accepted; nor have we been able to find any case determined by the courts of this State wherein the question was involved as for what cause the court might excuse the juror after accepted but before sworn.

It is thought that under the facts of this case the refusal of the Court of Appeals to consider the discharge of said Alexander, as stated, denies to the accused due process of law, and does not afford him the equal protection of the law.

While the trial court discharged Alexander, *it also allowed exceptions to be taken to its said ruling*, and had the accused by writ of error brought the case directly from the trial court to this court, on said ruling, upon the theory that the action of the trial court on this question was final, the state of the record would have defeated him, because, as it is claimed, Section 281 of the Criminal Code provides that such ruling "shall not be subject to exception," but the trial court, regardless of this section, permitted the exception to be taken, and therefore it became necessary for the Court of Appeals to act (regardless of what its action might be), before said ruling became final. The exception having been granted, it was in the power of the Court of Appeals to have reversed the case on said ruling. If by the discharge of Alexander the accused ~~had~~ has been denied due process of law or the equal protection of the law, he can not obtain relief except on this writ to the Court of Appeals.

Had the trial court refused to allow the exceptions to be taken, a writ from this court to the trial court would have been the proper remedy.

In Rogers vs. the State of Alabama, decided by this court January 18, 1904, it is said:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the right."

In Hopt vs. Utah, 120 U. S., 430 (30-708), it is said:

> "A challenge by a defendant in a criminal action to a juror for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if, until the jury is completed, he has other peremptory challenges which he can use."

See also Hayes vs. Missouri, 120 U. S., 71 (30-580), and in *Ex Parte* Spies, 123 U. S., 182 (31-86).

But this case at bar raises an entirely different question, and, while it is true,

> "that the right to challenge is the right to reject and not to select a juror,"

when one has been selected, he can not be discharged by the court without "good cause," and the accused is entitled to have the Court of Appeals pass upon the questions raised, where an accepted juror is so discharged.

VII.

That the Court of Appeals of Kentucky, in holding that, by reason of Section 281 of the Criminal Code of Practice of the State of Kentucky, it was without power to revise an error committed by the trial court in the manner of the for-

mation or selection of the trial jury, violated the Fourteenth Amendment of the Constitution of the United States of America in that said holding deprived the accused of his liberty without due process of law and denied to him the equal protection of the law.

By Sections 190 to 194, inclusive, of the Criminal Code of Practice it is provided—

"Sec. 190. The jury for the trial of criminal prosecutions shall be selected and summoned as provided in the General Statutes.

"Sec. 191. When an issue of fact in a criminal prosecution is about to be tried, the clerk shall draw, in the manner directed by the General Statutes, the names of twelve jurors, who, if not challenged by the parties, nor excused by the court, shall compose the trial jury.

"Sec. 192. When a juror is excused or a challenge to a juror is sustained, the clerk shall draw the name of another juror to fill the panel until the list of standing jurors is exhausted, when the court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury to be summoned by the sheriff, and the panel shall be filled from time to time from the jurors so summoned, and, if they be exhausted, similar orders may be made for summoning other jurors, until the jury is completed.

"Sec. 193. The court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially.

"If the judge of the court be satisfied, after having made a fair effort, in good faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed."

By Section 2247 of the Kentucky Statutes it is provided:

"The judge may, at any time during the term, when it is necessary, after the regular panel is for any reason exhausted, draw and select from the drum or wheel other persons to act as grand or petit jurors, or he may, in his discretion, direct that such jurors be supplied from bystanders; and the court may, after the regular grand jury has been discharged during any term of court, impanel a grand jury composed of bystanders, and may, in his discretion, fill vacancies in the grand jury from bystanders or by drawing from the drum or wheel. And the court, after the petit jurors for the term have been selected and impaneled, may, in any action, proceeding or prosecution, after said panel has been exhausted, direct the sheriff to supply from bystanders the place of one or more who may be hereafter excused by the court for good cause, or removed by the challenge of either party, or the judge may supply such jurors by drawing names from the drum or wheel as herein provided; and when the judge draws such names, he shall make a list thereof and deliver the list to the sheriff, who shall forthwith summon them: Provided, That, should the court discharge during the term the whole of any panel, then their places shall be supplied by the judge drawing from the drum or wheel."

The orders made in this case in the trial court as to the summoning of a special venire from Woodford County, were as follows:

"The defendant, James B. Howard, having been twice tried under this indictment in Franklin County, and the whole panel summoned and in attendance at this court having been exhausted, and only one juror found qualified, and the court being satisfied that it will be impracticable to obtain a jury free of bias in Franklin County, it is now ordered that A. G. Jeffers, sheriff of Franklin County, with sufficient deputies, proceed to Woodford County and there summon a special venire of one hundred and fifty (150) qualified jurors, Woodford

County being the county in which it appears to the court that there is the greatest probability of obtaining impartial jurors, and said jurors so summoned are to appear at the courthouse in Frankfort, Kentucky, at 2 o'clock on the 9th of April, 1903." * * *

"Upon the court directing a special venire to be summoned in this case from Woodford County, the defendant moved the court to require said jurors to be drawn from the drum or wheel in said county, as is required by law in the selection of jurors in said county, and the court, being advised, overruled said motion, to which the defendant objects."

* * * * * *

"It appearing that of the regular panel of twenty-four jurors drawn at the last term of this court to do jury service at this the present term fifteen of said panel appeared and answered to their names and were tested, and, for for cause, excused; and it further appearing that of the remainder of said panel some had died, some were excused on the certificates of physicians stating that they were by reason of sickness unable to attend court, and others were excused for reasons shown satisfactory to the court, and, on motion of the attorneys for the defendant that these facts be made to appear of record, it is so ordered by the court."

It is thus shown that the entire regular panel was discharged by the court and a special venire of one hundred and fifty (150) ordered from Woodford County.

By the last clause of Section 2247 of the Kentucky Statutes it is provided:

"That, should the court discharge during the term the whole of the entire panel, then their places shall be supplied by the judge drawing from the drum or wheel."

In the case at bar the whole regular panel was discharged, and the defendant insisted that this special venire of one hundred and fifty (150) be put in the wheel or drum and regularly drawn therefrom.

The motion is incorrectly entered, as from it, as it now reads, it would appear that the motion was intended to require that the jurors be drawn from the drum or wheel in Woodford County, but this was not intended, nor could it have been intended, nor did the court so understand it, because the judge was not there, but in Franklin County, where the court was then in session, and it was there that, by the terms of the motion as really ~~entered~~ made, the drawing was asked to be had.

It is insisted that this jury was not selected as required by law, in that under the facts as they existed the statute of Kentucky required them to be drawn by the judge, from the drum or wheel.

In Smith vs. the Commonwealth, 20 Ky. Law Reporter, page 1848, it is said :

> "It is true that Section 281 of the code provides that the decision of the lower court upon challenges to the jury and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception, but that section has no application to the mode of selecting and impaneling the jury."

When the nature of this crime is considered, that is, a political one, and the intense excitement necessarily consequent, the court will comprehend the necessity of the great care and caution to be used in the selection of a jury to try one charged with the offense.

This is fully illustrated by the conduct of Ben Hackett, who, after qualifying himself as a juror and being excused, sought to disqualify Alexander, a party who had been accepted on the jury, and that, too, by statements which, if true, would have necessarily disqualified said Hackett, and it is contended that the discharge of Alexander by the court was without any good cause.

After the verdict was rendered herein the defendant and his counsel were placed in possession of certain facts relative to Jurors R. T. Renshaw and Carter Neale, and thereupon, in the motion for a new trial, in grounds 21, set up said facts fully, supported by three affidavits filed therewith. Said entire proceeding, as it occurs in the printed record (see pages 49 to 60), is as follows:

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - *Plaintiff*,

vs. Motion and reason for a new trial.

James Howard, - - - - - - - - - *Defendant*.

Defendant, James Howard, moves the court to set aside the verdict herein and grant him a new trial, because he says his substantial rights have been prejudiced herein by reason of the following errors committed and proceeding had upon his trial, to wit:

* * * * * *

21st. And finally the defendant moves the court to set aside the verdict herein and to grant him a new trial because he says he has not had a fair and impartial trial for the following additional reasons:

That the defendant was mislead and prevented from procuring an impartial, unprejudicious and competent jury for the trial of his case by the answers and statements of Runyon Renshaw and Carter C. Neal, upon the examinations for qualifications as jurors:

R. T. Renshaw, examined on the *voir dire* by Mr. Franklin, stated as follows:

Q. Have you formed or expressed an opinion as to the guilt or innocence of the accused, James Howard?

A. No, sir.

Q. Are you a housekeeper ?

A. Yes, sir.

Q. Have you any conscientious scruples on the subject of capital punishment ?

A. No, sir.

Q. Have you any desire that the verdict be one way in this case rather than another ?

A. No, sir.

Q. Do you know any reason why, sworn as a juror, you could not try this case and return a perfectly fair and impartial verdict ?

A. No, sir.

Questioned by Mr. Edwards :

Q. Have you attended either one of the trials of Mr. Howard ?

A. No, sir.

Q. Have you read about it, or heard about it ?

A. I have read very little, and have heard only a little talk.

Q. Have you had any discussions as to the merits of the case ?

A. None that I recollect.

Q. You have neither had any opinion as to the guilt or innocence of Mr. Howard ?

A. No, sir.

Q. Did you hear it discussed any ?

A. Yes, sir; I heard it talked of.

Q. You formed no opinion whatever?

A. No, sir; I could not say I did.

Q. Have you any desire that the verdict in this case should be one way rather than another?

A. No, sir.

Q. Could you give a fair and impartial trial to both the Commonwealth and to the defendant?

A. I think so.

Q. Would you do that?

A. Yes, sir.

Carter Neal, examined by Mr. Franklin on the *voir dire*, stated as follows :

Q. Have you formed or expressed an opinion as to the guilt or innocence of the accused, James Howard, under this charge?

A. No, sir.

Q. Were you in Frankfort on the occasion of either of the former trials?

A. No, sir.

Q. Did you read about it in the newspapers?

A. I read some little.

Q. And you formed no opinion?

A. No, sir.

Q. Are you a housekeeper?

A. Yes, sir.

Q. What part of Woodford County do you live?

A. The western part.

Q. Have you any conscientious scruples on the subject of capital punishment?

A. No, sir.

Q. Do you know of any reason why, sworn as a juror, you could not try this case and return a perfectly fair and impartial verdict?

A. No, sir.

Q. Have you in your mind any prejudice or partiality for or against either side that would influence you at all as a juror?

A. No, sir.

Q. If sworn and accepted as a juror, do you think you could hear the evidence and the law as here given and render a perfectly fair and impartial verdict?

A. I think so.

Questioned by Mr. Edwards:

Q. You have formed no opinion?

A. No, sir.

Q. Have none now?

A. No, sir.

When in fact the said Renshaw had, prior to the time he was summoned as a juror herein, formed and expressed an opinion of the defendant's guilt, and further expressed his intention

to render a verdict that the defendant should be hung, if he was accepted on a jury to try his case; and the juror Carter C. Neal had, prior to the time he was summoned as a juror herein, formed and expressed an opinion of the defendant's guilt, and had further expressed an intention, if on a jury to try defendant, to return a verdict that the defendant should be hung; which facts appear from the affidavits of W. L. Graddy, L. C. Wafford and H. F. Johnson, this day filed herewith, and which facts were unknown to defendant, and could not, by the use of reasonable diligence, have been known to defendant until after the rendition of the verdict herein.

JAMES HOWARD.

J. A. VIOLETT,
J. A. SCOTT,
W. M. SMITH,
Attorneys for Defendant.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - - *Plaintiff*,
vs. Affidavit.
James B. Howard, - - - - - - - - *Defendant.*

This affiant, H. F. Johnson, states that he is a citizen and housekeeper of Woodford County, Ky., and his occupation is that of a farmer, and he is now also engaged with a contract to carry the United States mail between Versailles and Cicero, in said county, and, in addition, keeps a grocery in the village of Cicero; that he is acquainted, by sight and name, with Runyon Renshaw, of Versailles, one of the jurors on the trial of the above styled prosecution at the April Term, 1903, of the above styled court; that a short time after the former trial of the defendant in this court, in which the

defendant was sentenced to the penitentiary for life, the affiant was present on Main Street in Versailles, Ky., when said Renshaw was engaged in a conversation with three or four companions, and affiant heard said Renshaw state, in that conversation, in substance, either, "If I had been on the Howard jury I would have hung him," or, "If I was on the jury to try Howard I would hang him." Affiant is not now certain which of these statements was made by said Renshaw, but it was either one or the other. Said Renshaw and his companions were at that time engaged in discussing the guilt of Howard, and how he should be punished, and in that connection the above statement was made by said Renshaw.

H. F. JOHNSON.

Subscribed and sworn to before me by H. F. Johnson, this 30th day of April, 1903. F. TURNER,
Examiner Woodford County, Ky.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - - *Plaintiff*,
vs. Affidavit.
Jasmes B. Howard, - - - - - - - - - *Defendant*.

This affiant, L. C. Wafford, states that he is a citizen of Woodford County, Ky., and resides on the farm of Carter C. Neal, near Railey Station; that he has known said Carter C. Neal, who is one of the jurors who tried the above styled prosecution at the April term, 1903, of this court, for more than one year last past; that during the winter just past, this affiant had a conversation with said Neal, in which they were speaking of a trial in the Woodford Circuit Court, of a boy who was charged with murder, and during said conver-

sation this affiant asked said Neal, 'What would you do with Howard, if (meaning the defendant in this case) you were on his jury?" And the said Neal, in response to said question, answered, "I would hang him on the highest limb." Said conversation occurred in Woodford County, Ky., in the neighborhood where said Neal's farm was located, on the land of W. L. Graddy, while this affiant was engaged with said Neal in hulling clover for said Graddy.

The affiant further states that the Howard referred to in the above mentioned conversation was the Jas. B. Howard who was charged with the murder of William Goebel, and the jury referred to in affiant's said question, was a jury to be selected to try said Howard for that murder.

L. C. WAFFORD.

Subscribed and sworn to before me by L. C. Wafford this 30th day of April, 1903. R. H. GRAY,
Clerk of Woodford County Court.
By JOHN M. GRAY, D. C.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - *Plaintiff*,
vs. Affidavit.
James B. Howard, - - - - - - - - *Defendant*.

This affiant, W. L. Graddy, states that he is a citizen and a housekeeper of Woodford County, Ky.; that his occupation is that of a farmer; that he is well acquainted with Carter C. Neal, one of the jurors on the trial of this prosecution at the April Term, 1903, of the above styled court; that in the month of September, 1902, on the farm of this affiant, near Woodford County, Ky., on which affiant resides, the said

Carter C. Neal, in a conversation with affiant relative to the murder of William Goebel, and to those persons charged with its commission, and in said conversation stated to affiant in substance that he believed the defendant, James B. Howard, was guilty of the crime of murder with which he was charged by indictment, and that he (said Neal), if on the jury to try him, would return a verdict that defendant Howard * * * Said Neal further states in substance that he thought Henry E. Youtsey and other persons charged with said crime were guilty, and that said Youtsey should be punished by confinement in the penitentiary for life.

And about the last of October, or during the month of November, 1902, or thereabouts, on a different farm of the affiant in Woodford County, known as the Gibson place, said Neal engaged in another conversation with the affiant as to the murder of said Goebel, and as to said Howard's connection with the same, in which Neal stated to affiant, in substance, that he believed the defendant Howard was guilty of Goebel's murder, and that, if he was on the jury to try him, he would return a verdict that he (said Howard) should be hung.

W. L. GRADDY.

Subscribed and sworn to before me by W. L. Graddy, this 30th day of April, 1903. F. TURNER,
Examiner, Woodford County, Kentucky.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - - *Plaintiff*,
vs. Affidavit.
James Howard, - - - - - - - - - *Defendant*.

Defendant, James Howard, states that he had no knowledge or information in regard to the statement in the matter

set forth in the affidavit of W. L. Graddy, L. C. Wafford and H. F. Johnson, filed with his motion and grounds for a new trial herein, until after the rendition of the verdict in this case, and could not have learned of same sooner by the exercise of reasonable diligence. JAS. B. HOWARD.

Subscribed and sworn to before me by James Howard, this 2nd day of May, 1903. WM. CROMWELL,
Notary Public, F. C., Ky.

Thereupon the attorney for the Commonwealth offered to file the affidavits of Carter C. Neal, J. L. Bohannon, E. P. Bunton, Arthur Sublett, to which the defendant, by counsel, objected, and the court overruled the objection, and permitted the affidavits to be filed, to which the defendant, by counsel, excepted, and still excepts.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - *Plaintiff*,
vs. Affidavit of Carter Neal.
James B. Howard, - - - - - *Defendant*.

This affiant, Carter Neal, states that he has read the affidavit of W. L. Graddy filed herein on this day in support of motion for new trial for above defendant; he says further that he denies that in the month of September, 1902, or at any other time, on the farm of affiant W. L. Graddy, in Woodford County, Kentucky, on which W. L. Graddy resides, or at any other place, in conversation with W. L. Graddy relative to the murder of William Goebel, and those charged with its commission, that he said to W. L. Graddy either in words or substance that he believed the defendant, James B.

Howard, was guilty of the crime of murder with which he was charged by indictment, and he denies that he at any time or place said to said Graddy, or to any other person, that if he were on the jury to try defendant, Howard, that he would return a verdict that defendant, Howard, should be hung; he denies that he said in words or substance at any time or any place to said W. L. Graddy that he, this affiant, thought Henry Youtsey and other persons charged with said crime were guilty, and that said Youtsey should be punished by confinement in the penitentiary for life; this affiant, Carter C. Neal, further says that he denies that on or about the last of October, or during the month of November, 1902, or at any other time, on a different farm of W. L. Graddy, in Woodford County, known as the Gibson place, that he engaged in any conversation with affiant W. L. Graddy, as to the murder of said Goebel, or as to Howard's connection with same; he denies that he, this affiant, either in form of words or substance, said to the affiant, W. L. Graddy, that he believed the defendant, Howard, was guilty of Goebel's murder, or that if he was on the jury he would return a verdict that said Howard should be hung.

This affiant further says that above mentioned affiant, W. L. Graddy, is a strong sympathizer with those accused of complicity in the murder of William Goebel; that on the day the verdict in this case was rendered, as this affiant is reliably informed, said W. L. Graddy, in the early morning, was seen in the neighborhood of the home of this affiant, presumably for the purpose of procuring some sort of information or statement from somebody in the employ or connected with the family of this affiant, to be used for new trial purposes in the event of a verdict against said defendant Howard.

This affiant further says that two of the neighbors of this affiant informed him, that W. L. Graddy was intense in his feeling and opposition to a conviction of any one charged

with the murder of William Goebel, and that said Graddy had said to them that he would spend $50,000.00 before Howard should be convicted of the crime charged against him.

This affiant says that it is untrue that he ever said, in form of words or substance, anything to W. L. Graddy that directly or * * * indicated to said Graddy that he had any opinion as to the guilt or innocence of defendant, James Howard.

Affiant Carter C. Neal further states, that, while he is acquainted with L. C. Wafford, whose affidavit was by defendant herein this day filed, yet he denies that during the winter just past, or at any other time, he ever had a conversation with said Wafford touching the guilt or innocence of any one charged with complicity in or with the murder of William Goebel; he denies that said Wafford asked him: "What would you do with Howard (meaning the defendant in this case), if you were on the jury?" And he denies that this affiant, in response to said question, answered: "I would hang him on the highest limb." He says that said statement of said Wafford is absolutely and wholly untrue; that he never had a conversation with said Wafford in the neighborhood of where this affiant's farm is located or on the land of W. L. Graddy, while this affiant was engaged with said Wafford in hulling clover for said Graddy, or at any other time, or at any other place, or under any circumstances, touching on the guilt or innocence of any one in connection with the murder of William Goebel.

This affiant says that he has information which confirms him in the opinion that said L. C. Wafford was procured to make the affidavit filed herein by W. L. Graddy, whose affidavit is hereinbefore referred to and on file herein.

This affiant further says that until the hearing of the evidence on the trial of James Howard he had not sufficient

information upon which to base a belief as to who was guilty of the murder of William Goebel, and had not any prejudice or feeling against this defendant, and he says that he, in the making of his verdict, was influenced only by the evidence and the law as presented upon this trial.

CARTER C. NEAL.

Subscribed and sworn to before me by Carter C. Neal, this May 2d, 1903. OSCAR E. WOLFE,
Notary Public, Franklin County, Ky.
My commission expires Feb. 14, 1906.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - *Plaintiff,*
vs. Affidavit of A. G. Jeffers.
James B. Howard, - - - - - - - - *Defendant.*

This affiant, Albert G. Jeffers, says that he is the sheriff of Franklin County, and summoned the jury ordered to be summoned from Woodford County by this honorable court; that after said jury was summoned in the town of Versailles, in Woodford County, on Monday, the 27th of April, 1903, W. L. Graddy, whose affidavit is filed on this motion for a new trial, reproached him because he had not summoned said W. L. Graddy to serve as a juror in this case.

A. G. JEFFERS, S. F. G.

Subscribed and sworn to before me by A. G. Jeffers, this May 2d, 1903. OSCAR E. WOLFE,
Notary Public, Franklin County, Ky.
My commission expires Feb. 14, 1906.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - *Plaintiff*,

vs. Affidavit of Arthur Sublett, J. L. Bohannon and E. P. Bunton.

James Howard, - - - - - - - *Defendant*.

These affiants, Arthur Sublett, J. L. Bohannon and E. P. Bunton, say that they are sheriff and deputy sheriffs of Woodford County, Ky.; that Commonwealth's Attorney Franklin applied to them to find Runyon Renshaw, that he might be present in this court to file his affidavit touching the truth or falsity of the statements in the affidavit of H. F. Johnson, filed herein on the motion for a new trial; that they made diligent search, and failed to find said Renshaw in Woodford County, but learned that said Renshaw is now in the city of Louisville, where he has been for the last few days; that it will be impossible to procure the attendance here of said Renshaw before the adjournment of this court; they say, further, that they are well acquainted with said Renshaw; that he is a man of high personal character and integrity, a very quiet man, rarely expressing an opinion upon any subject, even of great public interest.

ARTHUR SUBLETT,
J. L. BOHANNON,
E. P. BUNTON.

Subscribed and sworn to before me by Arthur Sublett, J. L. Bohannon and E. P. Bunton, this May 2d, 1903.

OSCAR E. WOLFE,
Notary Public, Franklin Co., Ky.

My commission expires Feb. 14, 1906.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - *Plaintiff*,

vs. Affidavit of Jas. L. Bohannon.

James Howard, - - - - - - - - *Defendant.*

This affiant, James L. Bohannon, says that he is slightly acquainted with H. F. Johnson, whose affidavit is filed herein on defendant's motion for a new trial; that said Johnson is not a neighbor, friend or associate of Runyon Renshaw, but that said Johnson lives or loafs, when not carrying the United States mail, in the neighborhood of W. L. Graddy, whose affidavit is filed herein. J. L. BOHANNON.

Subscribed and sworn to before me by Jas. L. Bohannon, this May 2, 1903. OSCAR E. WOLFE,

Notary Public, Franklin Co., Ky.

My commission expires Feb. 14, 1906.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - - *Plaintiff*,

vs. Affidavit of E. P. Bunton and J. L. Bohannon.

James Howard, - - - - - - - - - - *Defendant.*

These affiants, E. P. Bunton and J. L. Bohannon, say that they are citizens and residents of Woodford County, State of Kentucky; that they are well acquainted with W. L. Graddy, whose affidavit is on file herein, and from their association, conversation with, and knowledge of, said W. L. Graddy, knew him to be an intense sympathizer with those charged with the murder and with complicity in the murder of Wm. Goebel; they further say that it is the common talk in the town of Versailles that said Graddy has

in the last few days, about the courthouse and other public places in the town of Versailles, been declaring his belief in the absolute innocence of James Howard under this charge, and saying that he would spend $50,000 before he (Howard) should pay the penalties fixed in the verdict of this jury.

E. P. BUNTON,
J. L. BOHANNON.

Subscribed and sworn to before me by E. P. Bunton and J. L. Bohannon, this May 2, 1903. OSCAR E. WOLFE,
Notary Public, Franklin County, Ky.

My commission expires Feb. 14, 1906.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - - *Plaintiff*,
vs. Affidavit.
James Howard, - - - - - - - - - - *Defendant.*

Defendant, James Howard, states that he, through his attorneys, completed his motion and reasons for a new trial herein yesterday afternoon, and he is informed by both one of his attorneys and the Commonwealth's attorney that yesterday afternoon W. M. Smith, one of his attorneys, gave to the Commonwealth's attorney the names of Renshaw and Neal, and the statements that were claimed they made before qualifying as jurors, and told him the substance of said statement, and that he did not know, nor did his attorneys, what these counter affidavits would contain, and had no intimation of what it would be, and did not know of it until a few minutes since, and that he believes, if allowed a reasonable time, he can show to the satisfaction of the court that the statements contained in the original affidavits filed by defendant are

true, and to disprove the statements and insinuations in the counter affidavits.

Therefore defendant prays the court, in the event said counter affidavits be permitted to be filed, he be given time to file affidavits or introduce witnesses to disprove the statements in the counter affidavits. JAS. B. HOWARD.

Sworn to before me by J. B. Howard, this May 2nd, 1903.
J. R. ELLIOTT, C. F. C. C.

And upon the filing of the affidavit the defendant, by counsel, moved the court to give the defendant time to file additional affidavits or introduce proof as stated in said affidavit, to which the Commonwealth objected, and the court sustained the objection, and refused to give the defendant time to either file affidavits or introduce proof, to which ruling of the court the defendant at the time objected and excepted, and still excepts.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, - - - - - *Plaintiff*,

vs.

Jas. B. Howard, - - - - - - - - - *Defendant.*

The court thereupon overruled the motion of the defendant to set aside the verdict and grant him a new trial, * * * to which ruling of the court the defendant at the time excepted, and still excepts. The court thereupon rendered the following judgment and sentence of the defendant. * * * And thereupon an appeal was prayed and granted.

By this record it appears that upon one afternoon this information was received, and on the same afternoon the grounds for a new trial were completed, and the attorney for

the Commonwealth, upon said day, was notified of the affidavits that would be filed as against Renshaw and Neal. That upon the next morning, upon the filing of the grounds for a new trial, the Commonwealth's attorney, without previous notice thereof to the attorneys for the defense, offered certain counter affidavits which were objected to, but the objection being overruled, the attorneys for the defense asked for time to prepare and file further affidavits in regard to the matter and to hear oral testimony, or to do either as the court might direct, but the court refused to grant any time whatever to defendant, and thereupon overruled said motion and sentenced him. One of these counter affidavits filed by the Commonwealth was made by Neal, the juror attacked. Renshaw, however, made no affidavit, although he was within some sixty (60) miles of the court, in the city of Louisville, and some three or four daily trains were running between there and the city of Frankfort.

Considering the gravity of the charges made against these jurors, and the nature of the counter affidavits filed, it is suggested that, as the liberty of a citizen was at stake, the action of the court was with seeming unnecessary haste.

The court that tried this case has quarterly terms, and, considering the fact that these jurors had been charged with an offense which not only, if the statements against them be true, prevented the defendant from having a fair and impartial trial, but concerned the public welfare in general, it is thought that the court could at least have permitted the defendant either then to have filed additional affidavits or introduce oral evidence as to the truth or falsity of said charge, and, if it become necessary in order to permit a full investigation, to continue said matter to another term.

Except the affidavit of Neal, these counter affidavits are not of material nature, and the juror, Renshaw, ought to have

been compelled to testify in regard to said matter before the court acted upon it. These charges against jurors ought not to be hastily made, and it is but reasonable to suppose that they will not, without, at least, the positive testimony of some credible person upon which to base it, and when so made, in justice to all concerned, the matter ought to be thoroughly investigated before passed upon. This seems to be nothing more than the dictates of common justice.

The parties upon whose statements the charges are made in this case are, by the counter affidavits, attacked, and the court, acting upon said counter affidavits, refusing to hear from the defendant upon said proposition, decides the question.

It is submitted that this is not due process of law. It may be in form, but not in substance.

As in the case of the discharge of Alexander, so in this matter, in reference to the jury, *an exception was allowed.* Therefore, if the court should determine that Section 281 would ordinarily apply, it could not do so here, for the reason stated hereinbefore, that is, that the ruling was not final.

In Yick Wo vs. Sheriff of the City and County of San Francisco, 118 U. S. 306 (30 Law Ed., 220) it is said:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson vs. Mayor, etc., of New York, 92 U. S., 259 (Bk. 23, L. Ed., 543); Chy Lung vs. Freeman, 92 U. S., 275 (Bk. 23, L. Ed., 550); Ex Parte Va., 100 U. S., 339 (Bk. 25, L. Ed., 676); Neal vs. Delaware, 103 U. S., 370 (Bk. 26, L. Ed., 267); and Soon Hing vs. Crowley (supra).*"

The court will observe that the entire record in this case has not been printed, that is, the evidence in the case has been omitted. The entire record, however, was filed in the clerk's office of the Supreme Court; but as the defendant had not sufficient means to enable him to print all of it, the Attorney General of the State of Kentucky very kindly offered to, and did, sign a stipulation to omit the evidence from the printed record, as same was not considered necessary upon the hearing of the questions herein involved.

By the record herein, it is shown that at the time of the commission of this offense, suspicion rested upon several persons, some of whom fled the country, and others obtained pardon therefor from the Governor of the State. Howard, the defendant in this case, did neither; but, upon the contrary, when he learned that he had been indicted, being at his home in the eastern part of the State, immediately came to Frankfort, surrendered himself to the officers of the law, and voluntarily, as it were, entered prison to await a trial, knowing at the time, too, that the excitement at Frankfort was intense, and that to even charge one with complicity in this crime was to place, not only his liberty, but his life, in danger. He has thus remained in prison for nearly five years, and sustained by that same consciousness which caused him first to surrender for trial, he now submits his case for final hearing.

Wm. Smith

Attorney for Plaintiff in Error,

JAMES B. HOWARD.

J. A. VIOLETT,
J. A. SCOTT,
CARLO B. LITTLE,
Of Counsel.

FILE COPY.

No. 77.

[redacted].

Office Supreme Court U. S.
FILED
NOV 22 1905
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1905.

JAMES B. HOWARD, ... Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

SUPPLEMENTAL BRIEF OF W. M. SMITH ON BEHALF OF PLAINTIFF IN ERROR.

W. M. SMITH,
Attorney for Plaintiff in Error.

J. A. VIOLETT,
J. A. SCOTT,
CARLO B. SITTLO,
Of Counsel.

F. C. HUBBMACHER PRESS, LOUISVILLE, KY.

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Supreme Court of the United States.

No. 888.

JAMES B. HOWARD, ... *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

Supplemental Brief for Plaintiff in Error.

I.

For plaintiff in error, it is insisted that a Federal question is seasonably presented, although made for the first time in the Appellate Court, by a petition for rehearing, provided said court passes upon same, and holds against the party invoking protection under the Constitution or laws of the United States. (See original brief, pp. 27-28, for authorities relied on.)

The petition for rehearing is found on pages 75, 76 and 77 of printed transcript of record, and the response thereto on page 78.

II.

Plaintiff in error charges in his petition for rehearing (p. 75 of transcript), and in his assignment of errors (pp. 88-91), that he has been deprived of his liberty *without due*

process of law, and *has been denied the equal protection of the laws*, guaranteed by the Fourteenth Amendment of the Constitution of the United States of America.

III.

Section 7 of the Constitution of the State of Kentucky preserves the ancient right of trial by jury. Section 11 of said Constitution, and Sections 183 and 229 of the Kentucky Criminal Code of Practice, are but declarations of the common law as to the fundamental right secured to the accused by the criminal law, that is, to be present during the whole trial; his presence being not only a right, but a jurisdictional fact that cannot be waived.

Section 233 of said Constitution adopts the laws of Virginia in force June 1, 1792.

Ray vs. Sweeney, 77 Ky. p. 9, holds that the common law, that is, the rules and principles in force before the fourth year of the reign of James I, were in force in Virginia in 1792, and are therefore the law of Kentucky, except in so far as they have been changed or modified, and this Honorable Court has held in a number of cases that in such changes or modifications the State must have due regard for the fundamental rights of the accused. As to the last proposition, see Civil Rights Cases, 109 U. S. 11 (27-835), in which it is said:

> " It does not authorize Congress to create a Code of Municipal Law for the regulation of private rights, but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when they are subversive of the fundamental rights specified in the Amendment."

In United States vs. Cruikshanks, *et al.*, 92 U. S. 554 (23-588), it is said:

"The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."

IV.

The rights of the accused to be present from the time of the arraignment to the judgment, is a fundamental right, protected by the Fourteenth Amendment; it cannot be waived; nor can the State, through any of its instrumentalities, impair said right or avoid the necessity of such presence.

At common law temporary absence is excepted, so in Kentucky; in said State the common law doctrine obtains, permitting only the exceptions therein found. In the original brief for plaintiff in error, the cases sustaining these contentions, are fully cited (pages 69 to 135, inclusive).

V.

When a plea of jeopardy or the forfeiture of bond is considered, then it is universally held that the trial does not begin until the jury is sworn.

But when the fundamental rights of the accused to be present when the jury is being selected, that is, the absolute necessity for such presence at the most critical time of the trial, is considered, then the protection of such right cannot be had without holding that the trial begins when the defendant is arraigned.

See Hopt's People of Utah, 110 U. S. 574.

VI.

J. C. Alexander was the eleventh juror tested and accepted by both the Commonwealth and the defendant, when the Commonwealth's attorney suggested to the court that he had a matter he desired to present to the court out of the presence of the other jurors accepted; thereupon defendant and all the attorneys in the case retired to a private room, and the Commonwealth's attorney filed the affidavit of one Ben Hackett and asked that J. C. Alexander be discharged from said jury, to which objections were entered by defendant.

The said Hackett having previously qualified as a juror in said case, and having been previously challenged by defendant and excused, the court refused to consider the first charge in his affidavit against Alexander, that is, that he and Alexander had both talked about the case and expressed an opinion therein, before the trial began; the following order and bill of exceptions were made and filed (see transcript, pages 32, 33, 34 and 35), to-wit:

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, Plaintiff,
vs.
Jas. B. Howard, Defendant.
} Order.

Commonwealth's Attorney Franklin came into the court and, in the presence of the accused and his counsel, stated that he had a matter that he desired to bring to the attention of the court, away from the presence of the jury. Thereupon the court, counsel for the Commonwealth, the defendant in person, and his counsel, retired to the county judge's office. Thereupon the attorney for the Commonwealth filed the affidavit of Ben. F. Hackett, and, for reasons

therein shown, moved the court to discharge Juror J. C. Alexander from service as a juror on the trial of this case, to which motion defendant by counsel objected, and argument of counsel on both sides being heard upon the objection, it was agreed by counsel on either side that the court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to said Hackett while in the custody of the sheriff, "Hello, Ben! I am glad they cut you off of this jury as I did not want to serve on this jury with you"; and the said Alexander having admitted the truth of said statement, but claimed that said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the court when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged; and the court, being thus advised, overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel excepts.

Thereupon the defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court, being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel excepts.

The following affidavit was filed April 10th, 1903.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, vs. James B. Howard.	Affidavit of Ben Hackett.

This affiant, Ben Hackett, says that after the killing of William Goebel, he and Mr. J. C. Alexander, who had been accepted on the jury to try said case, had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been

a conspiracy to murder Goebel among those who were charged with this murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him. These arguments and conversations occurred at different times and places in Woodford County during the time that has elapsed since the murder of Mr. Goebel, were frequent and much earnest feeling was expressed by both this affiant and Mr. Alexander therein.

This affiant further says that on yesterday afternoon, late, after Mr. Alexander had been accepted as a juror to try the case and after the affiant had been excused, after those accepted as jurors had been charged and admonished by the court, and immediately after the adjournment for supper, and as the jury was being conducted by the sheriff away from the courthouse, affiant, by accident, met the jury as they were passing out through the courthouse yard, when, in passing, Mr. Alexander said to this affiant, "Hello, Ben! I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Affiant, Ben Hackett, says the foregoing statements are true.

BEN HACKETT.

Subscribed and sworn to before me by Ben Hackett this April 10th, 1903.

JAS. H. POLSGROVE,
County Judge, Franklin Co.

The following bill of exceptions was filed April 10, 1903.

FRANKLIN CIRCUIT COURT.

Commonwealtth of Kentucky, Plaintiff,
vs.
Jas. B. Howard.
} Bill of Exceptions

Be it remembered:—

That on the trial of this case, on the 10th day of April, 1903, there had been tested and accepted by both Common-

wealth and defendant herein, eleven jurors, J. C. Alexander being one of them, and the twelfth juror had been called and qualified himself, as a competent juror.

Thereupon the Commonwealth's attorney, together with the attorneys assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterwards returned into the court and filed the affidavit of Ben Hackett, which is as follows:

(Said affidavit is here copied in the bill.)

And moved the court, for reasons shown in said affidavit, to discharge said J. C. Alexander from service as a juror on the trial of this case, to which the defendant by counsel at the time objected, and the court overruled said objection, and discharged said Alexander from service as a juror herein, to which defendant at that time excepted, and still excepts. That at the time said motion was entered, and said Alexander was so discharged, the Commonwealth had exhausted of its peremptory challenges three, and the defendant had exhausted of his peremptory challenges twelve.

That on said motion to discharge said Alexander, and before he was discharged by agreement with counsel upon either side, the court privately examined said Alexander as to the truth of the charges as to what he said to said Hackett while he, Alexander, was in the custody of the sheriff; and the court thereupon, being advised, discharged said Alexander as stated. To all said rulings of the court defendant at the time objected and excepted, and objects and excepts, and files this said bill of exceptions, duly signed and approved by the court.

JAMES E. CANTRILL,
Judge.

By said order it is shown that the court only examined Alexander as to what he said to Hackett while he (Alexander) was in charge of the sheriff, and for that, *and that alone*, excused him, because, although jocularly said, the court held that it was a violation of the admonition of the court; the bill of exceptions shows that the court privately

examined Alexander and as to what matter (see transcript, pages 32, 33, 34 and 35).

VII.

For the Commonwealth it is contended, that "the right to challenge is the right to reject, and not to select, a juror."

And the case of "Spiers," among others, is referred to as sustaining this doctrine; these were all cases, however, wherein the juror had not been "accepted."

In the case at bar, the juror had been "accepted" by both sides.

In Kentucky the selection of a jury is governed solely by statute.

Section 250 of the Criminal Code of Kentucky provides:

> "If a juror has been accepted, but before the jury has been completed one of the accepted jurors becomes so sick as to prevent the continuance of his duty, the court may excuse such juror, and complete the formation of the jury as if he had been originally accepted."

A juror tested and accepted stands in the same attitude as one "sworn," so far as the right of the court or parties to excuse is concerned.

Kentucky Criminal Code, 251.

A juror who has been "accepted" can only be excused when an absolute necessity for such excuse arises, and if the court excuses such a juror, in a case where no such necessity exists, it is an abuse of discretion.

Munday vs. Commonwealth, 81 Ky. 233.
Coloins vs. Commonwealth, 22 Ky. Law Reporter.
O'Brien vs. Commonwealth, 72 Ky. 333.

In Max Kling vs. Missouri, 80 U. S. 263, this identical

question arose, and the court clearly indicated in said opinion that on this point the case would have been venired, but for another question that is not in this case at bar.

But the question here is not one of excusing a juror, but of examining a juror who has been "accepted," out of the presence of the accused; after the juror has been accepted he has such a right to claim his services on the jury as entitled him to be heard, both himself and witnesses. It is part of the trial, and his presence cannot be waived.

VIII.

On the trial of this case on April 8th, 1903, the court made an order showing that out of the entire panel selected only one qualified, and therefore ordered a venire of 150 to be summoned from Woodford County. (See page 5 of transcript.)

Afterwards the following order was made (see page 8 of transcript).

It is thus shown that the entire panel was discharged and the venire of 150 ordered to be summoned from Woodford County.

Defendant moved that these jurors be drawn from the "wheel." This motion was overruled and exceptions reserved. By a clerical error, which corrects itself, the motion is entered to draw from the Woodford County wheel.

By the latter clause of Section 2247 of the Kentucky Statutes it is provided:

> "That, should the court discharge during the term the whole of any panel, then their places shall be

supplied by the judge drawing from the drum or wheel."

(See page 165, brief of plaintiff in error.)

This proceeding was not "due process of law" or "equal protection," and the affidavits filed on motion for new trial (page 168 of transcript) show the prejudicial results to the accused therefrom.

IX.

While the Court of Appeals of Kentucky passed on these questions, especially the one raised as to the examination of Alexander out of the presence of the accused, still it further held that it could not reverse for any of said points raised, because of Section 281 of the Criminal Code of Practice of Kentucky, which provides:

> "The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

This question as to the examination of Alexander out of the presence of defendant is not "a challenge to the panel," or "for cause," or "a motion to set aside an indictment," or "motion for new trial," and cannot possibly fall under said Section, and the court in so holding deprived accused of "due process of law" and equal protection thereof. "A lawful statute may be so unlawfully administered as to entitle the accused to protection under the Fourteenth Amendment."

In Smith vs. Commonwealth, 20 Ky. Law Reporter, 1848, it is said: "It is true that Section 281 of the Code provides that the decision of the lower court upon chal-

lenges to the panel and for cause, upon a motion to set aside in indictment, and upon motions for a new trial, shall not be subject to exceptions. But that section has no application to the mode of selecting and empaneling the jury."

In both the petition for rehearing, and the assignment of errors, this construction of this section, given by the Court of Appeals, is complained of, as well as the section.

This case was appealed upon the whole record, the error as to the examination of Alexander is apparent in the record. The Court of Appeals passed upon it fully; it had jurisdiction of the case, and whether it be that said section is unconstitutional or is merely so construed by the highest court of the State as to abridge the fundamental right of accused, the question is the same, and the protection of the Fourteenth Amendment may be invoked.

If the section is in itself unconstitutional, then the Court of Appeals did right in disregarding same and taking jurisdiction, and passing on the question.

On the other hand, if the error consists, alone, in the construction given this section by the highest court of the State, then this court can review same, because such construction, attempting to include this examination of Alexander under said section, is not due process or equal protection, and, as the error is apparent upon the record, and violates a fundamental right of the accused, and passed on by the Court of Appeals, under said state of facts, a review by this court can be had; no exception is necessary, as the point cannot be waived.

Miller vs. Nicholls, 4 Wheat. 311 (4-578).

State legislatures may regulate appeals, but in doing so shall not deprive the accused of any fundamental right; otherwise the Fourteenth Amendment can be invoked.

See Rogers against Alabama, 192 U. S. 226.

In Bush against Kentucky, 107 U. S. 110 (27-354), this court ordered a reversal and indictment quashed; this section was then in full force, and the case seems to be directly in point.

In Powers against Commonwealth, 27 Ky. Law Reporter, decided by Judge Cochran, District Judge, Eastern District of Kentucky, but only reported in 27 Ky. Law Reporter it was held that Section 281 of Kentucky Criminal Code was an unlawful hindrance and obstacle to the rights of the accused, and disregarded same.

In the case of Powers vs. Commonwealth, 26 Kentucky Law Reporter, 1118, Judge Barker, of the Kentucky Court of Appeals, made a similar decision.

In *Ex parte* Powers, 129 Federal Reporter, 990, Judge Evans, of the Western District of Kentucky, said:

> " It is averred in the petition that the jury in this case was a packed jury, and that the manner of its selection was such as would only result, and was intended to result, in having a jury pledged in advance to convict the prisoner; but even that gives me no right to interfere, for, if we assume the facts to be true as stated, and if the questions of constitutional law growing out of them shall properly and adequately appear in the record of the State court, the remedy of the petitioner is complete through his appeal to the Court of Appeals of the State, and, if that tribunal should concur with the Circuit Court in denying or ignoring the constitutional rights claimed by the petitioner, the Supreme Court of the United States would doubtless assume jurisdiction upon a writ of error. Nor can it be supposed that this could be prevented by Sections 280 and 281 of the Criminal Code of Kentucky, which exclude the right of exception to anything that may be done in the formation of the jury in the trial court; for otherwise every constitutional guaranty could be crippled or destroyed by similar means with ease and facility. Shutting off, or

attempting to shut off, consideration by a higher court of such questions, while allowing all others which may affect results involving the life or liberty of the accused to be reviewed and corrected, can have no effect upon the rights or powers of the Supreme Court under the Constitution of the United States, if, indeed, the Court of Appeals itself can constitutionally ignore or be exempted from the duty of enforcing the constitutional rights of the citizen, if appealed to for the purpose. See, especially, Rogers vs. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. The constitutional provisions referred to are of higher sanction than any statute or Code, and create rights which it is the duty of the judicial tribunals to protect and enforce, any law of any State to the contrary notwithstanding."

X.

Under Section 340 of the Kentucky Criminal Code of Practice, it is held that:

"Unless it affirmatively appear from the record that the accused was in no wise prejudiced by such an error, a reversal would result."

Allen vs. Commonwealth, 86 Ky. 642.
Meece vs. Commonwealth, 78 Ky. 586.
Temple vs. Commonwealth, 77 Ky. 796.
Rutherford vs. Commonwealth, 78 Ky. 640.
Crowley vs. United States.

Yet in this case at bar the Court of Appeals holds that it does not affirmatively appear that the rights of the accused have been prejudiced, reversing entirely the rules of law.

In Rutherford vs. Commonwealth of Ky., 78 Ky. 640, it is said: "When there is a departure from the funda-

mental rules of criminal procedure, this court should reverse, unless it affirmatively appear from the record, that the error complained of was not prejudicial."

The court will discover, upon comparison of opinions of Court of Appeals in brief and that in transcript, that they differ; that in brief was copied from copy of opinion furnished when case was decided.

Respectfully submitted,

W. M. SMITH,
Attorney for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
JAN 29 1906
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

No. 77.

JAMES B. HOWARD, - - - Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, - - - - - Defendant in Error.

MOTION.

WILL SMITH,
Attorney.

SUPREME COURT OF THE UNITED STATES.

No. 77.

JAMES B. HOWARD, - - - - Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

TO N. B. HAYS, ATTORNEY GENERAL OF THE STATE OF KENTUCKY.

You are hereby notified that on Monday, January 29, 1906, I will, in the Supreme Court of the United States, enter motion and move said court to suspend the issual of the mandate in the above style case, until March 6, 1906, and to grant me special leave to file a petition for rehearing therein on or before said day. I herewith hand you copy of motion and reasons assigned.

JAMES B. HOWARD.
By W. M. SMITH, Attorney.

Service of the above notice is hereby accepted, January 26, 1906.

N. B. HAYS,

Attorney General, State of Kentucky.

SUPREME COURT OF THE UNITED STATES.

No. 77.

JAMES B. HOWARD, - - - Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

MOTION.

Comes petitioner in error, James B. Howard, and moves the court to suspend the issual of the mandate herein until the 6th day of March, 1906, and to grant him special leave to file, on or before said date, a petition for rehearing herein, on the judgment and opinion rendered by this court on the 2d day of January, 1906.

JAMES B. HOWARD.

W. M. SMITH,
Attorney for Petitioner in Error.

SUPREME COURT OF THE UNITED STATES.

No. 77.

JAMES B. HOWARD, - - - Petitioner in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

Petitioner in error, James B. Howard, states that he is now confined under the charge herein, in the jail of Jefferson County, Louisville, Kentucky, and that W. M. Smith, his sole attorney, in charge of his case as far as relates to this court, resides in said city of Louisville.

He says that during the time since he obtained a copy of the opinion herein, which was rendered January 2d, 1906, his said attorney has been constantly engaged in the preparation of important contest cases now pending in the Jefferson Circuit Court, and the trial of preliminary motion therein, and that by reason of the nature of said contest cases, they can not be delayed.

That if the mandate is issued herein before his said petition for rehearing is passed on by this court, he will be removed to the penitentiary at Frankfort, Kentucky, and it will be then inconvenient, if not impossible, for him to confer with his attorney.

JAMES B. HOWARD.

W. M. Smith states that he is the attorney referred to in above statement of James B. Howard, and that insofar as same relates to him, the statements of said Howard are true.

That he desired to file a petition for rehearing herein, and that he believes he can present meritorious grounds for granting same, and he asks that the time in which to file same be extended to March 6, 1906, and that the issual of the mandate be suspended until said date.

W. M. SMITH.

FILE COPY.

OFFICE OF THE CLERK
RECEIVED
MAR 5 1906
SUPREME COURT U.S.

No. 888. 74

Supreme Court of the United States.

JAMES B. HOWARD, - - - - Plaintiff in Error,

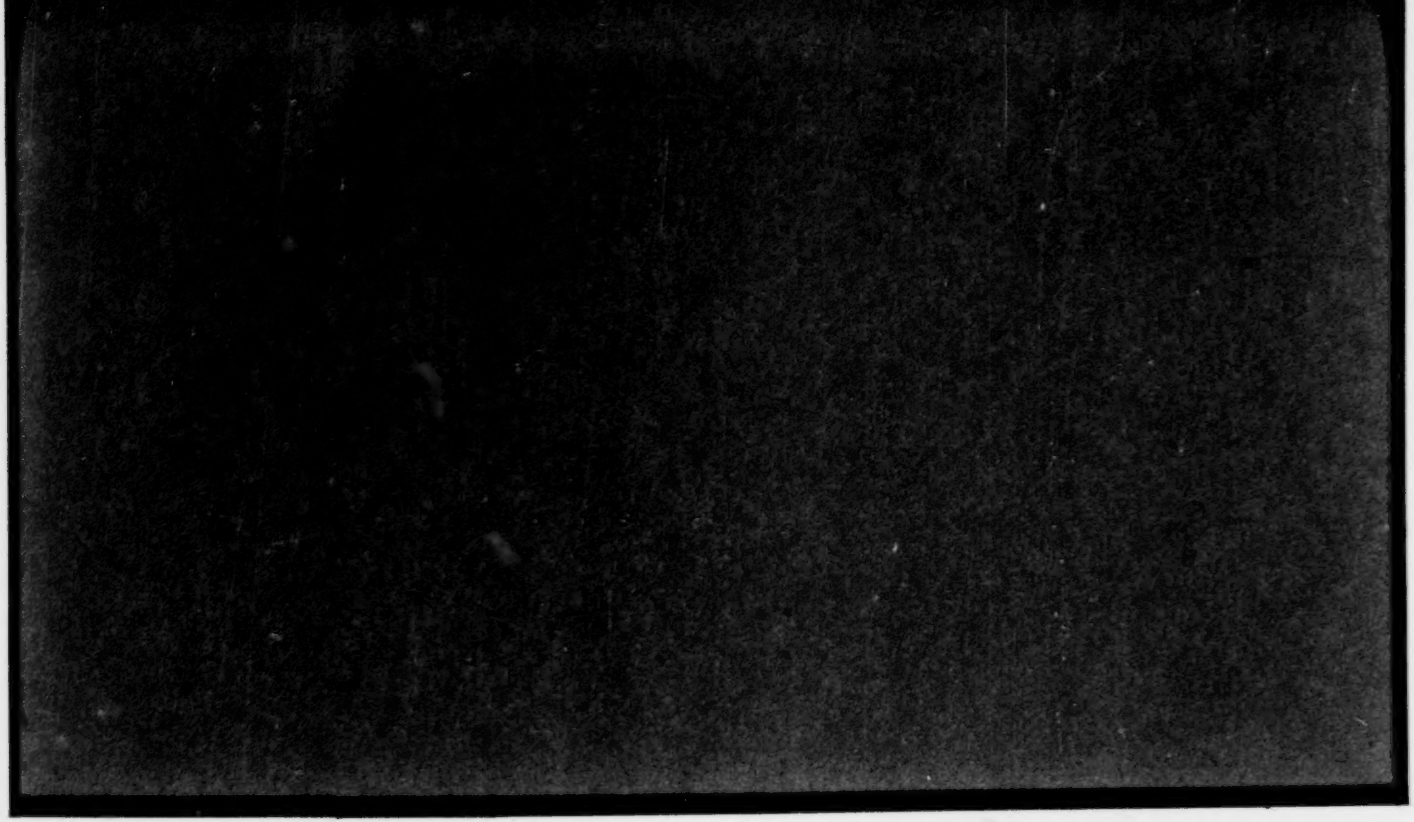
vs.

THE COMMONWEALTH OF KENTUCKY, - Defendant in Error.

PETITION FOR REHEARING.

W. M. SMITH,
Attorney for Plaintiff in Error.

F. C. HERRMANN PRESS, LOUISVILLE, KY.



No. 388.

SUPREME COURT OF THE UNITED STATES.

JAMES B. HOWARD, - - - - *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

PETITION FOR REHEARING.

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, plaintiff in error in the above entitled case, respectfully prays for an order directing a reargument of said case upon the following grounds:

First. Because of the extreme importance and far reaching effect, as far as plaintiff in error is concerned, of the decision which has been announced as bearing upon some of the most fundamental principles of Constitutional Law.

Second. The novelty of the question discussed and of the points necessarily determined by the judgment, and plaintiff in error believes and is advised by counsel that a further consideration of this case will lead this honorable court to a decision contrary to that heretofore rendered, and a more favorable determination to this plaintiff in error.

Third. It is submitted that by the Common Law which has been adopted by the Constitution and Statutes of the State of Kentucky, the accused has not only the right to be present, but must be present during the whole of the trial, and that his presence is not only an inalienable right, but a jurisdictional fact that can not be waived.

Fourth. That conceding that this right of presence during trial is a fundamental right, that same can not be violated even by a State Constitutional provision, much less by a statute, or the decision of a court.

Fifth. It is respectfully submitted that there are inviolable rights that are attached to citizenship that can not be waived, and that these rights have been recognized by this honorable court regardless of the construction of any State Statute or Local Law.

Sixth. That while it is true that this honorable court does not and will not undertake to regulate the administration of the criminal law in any State of the Union, yet it will protect the inalienable rights of citizens as against any infringement, violation or abridgment, and that this protection extends not only as against the constituted authorities, but the right of the prisoner himself, even by advice of counsel to waive.

Seventh. It is respectfully submitted that this is not an issue with the highest court of the State as to its construction, but a question as to whether or not any law can intervene in the matter of these rights regardless of surrounding circumstances or conditions.

Eighth. If it be conceded that human rights exist that can not be violated or waived, then it is submitted that State Statutes, the construction of which interfere therewith, will not be sustained by this honorable court, although sanctioned by usages of States, or the highest decision of the courts thereof, otherwise, these rights cease to be inalienable and become the subject of legislation or construction, contrary to the settled and established principles of the law, and the existence of human rights.

Ninth. The question presented is not considered as one of the decisions of the highest court of the State of its

statutory law, that perhaps would be final as far as this honorable court is concerned, or a question of practice that might be waived by the prisoner under advice of counsel, but a pure and simple question of an inalienable right made sacred and secure by reason of necessity, and such a right that the Fourteenth Amendment in its most limited construction necessarily protects.

And your petitioner, plaintiff in error, respectfully asks for a careful consideration of the paper annexed in which an attempt is made to more fully state and support the grounds above mentioned with such brevity as the nature of the case will admit, and he prays that his case be set down for reargument before this court upon some day to be appointed.

And as in duty bound, will ever pray.

W. M. SMITH,
Attorney for Plaintiff in Error.

I certify that, in my opinion, the foregoing petition for rehearing is well founded.

W. M. SMITH.

GROUNDS UPON WHICH THE REARGUMENT IS ASKED.

First. By the Magna Charta heretofore quoted at length in briefs filed in this case, in our opinion it fully appears that this right of presence during the trial is an inalienable right, that is, a right that can not be violated by any law of the land, and which right is protected by the Fourteenth Amendment; that this right can not be waived is established by Judge Brannon in his work on the Fourteenth Amendment, Cooley's "Constitutional Limitation," and various other text authorities cited. The case in this court of Michael Schwab vs. A. W. Berggren, 143 U. S. 442 (36-218), Lewis vs. The United States, 146

U. S. 370 (36-1012), and the case of Hopt vs. The People of Utah, 110 U. S. 574 (28-265), seem to be conclusive of the proposition.

Second. If it be conceded as it seems to have been in the opinion heretofore rendered in this case, that the right herein asserted is an inalienable right, and as determined in the Hopt decision, that that right can not be waived, it is insisted earnestly that under the decision in Rogers vs. State of Alabama, decided by this court January 18, 1904, (No. 407), that a State Statute which violates such a right would not be sustained by this court.

Third. If it be a fact that the presence of the accused, which by all the accepted authorities seems to be necessary during every material step taken in his case, constitutes a jurisdictional fact, then no matter what a State Court may determine, same is not binding if this jurisdictional fact is shown to be wanting. If the State Court had jurisdiction of the person of the accused, its decision might be binding, but if that jurisdiction is wanting, then the court has no power to act and its decision imposing a penalty is without authority, and its enforcement as against the accused is a violation of his rights, which are protected by the Fourteenth Amendment. The premises conceded this contention is not in conflict with the case *in re* Converse, 137 U. S. The jurisdiction is lost whenever a material step is taken in a prosecution for a felony in the absence of the accused, regardless of whether or not that absence occurs with or without his consent. It is the duty of the State to see that he is present and, if not, to take no further step in the proceedings until such presence is secured. This is not only a right, but a duty that has existed from time immemorial, and no State in the Union recognizes that duty more fully and completely than do the laws of the State of

Kentucky, but, regardless of State laws, this right exists and this duty is imposed and can not be disregarded.

Fourth. It is insisted that by reason of Section 281 of the Criminal Code of practice of the State of Kentucky, that the plaintiff in error is deprived of the right to complain herein. It is submitted, however, as a legal proposition, that if the right be an inalienable right as determined by this court, it can not be violated, even by a State Constitutional provision, much less a statutory enactment or a construction thereof, and that if the presence is a jurisdictional fact, any action during the absence of the accused under any condition is void, and the subsequent proceedings adjudging any penalty is a violation of the rights of the accused, such rights as are protected by the Fourteenth Amendment.

Fifth. Succinctly stated, the contention of plaintiff in error, is:

1. That the right asserted to be present during the entire trial when any material step therein is taken, is an inalienable right.

2. That this right must be protected by the court and can not be waived by the defendant.

3. That such presence is a jurisdictional fact, and any proceedings had in a felony case during the absence of the accused, renders the entire proceeding void, and the attempt to enforce any punishment adjudged therein is a violation of the rights of the accused.

6. These propositions, as above contended for, are thought to be elementary, and without exception they are believed to be sustained by every text book, and certainly as to some by this honorable court, especially by the Hopt case The reason of the law is apparent, common justice pleads for such an interpretation, and humanity requires it.

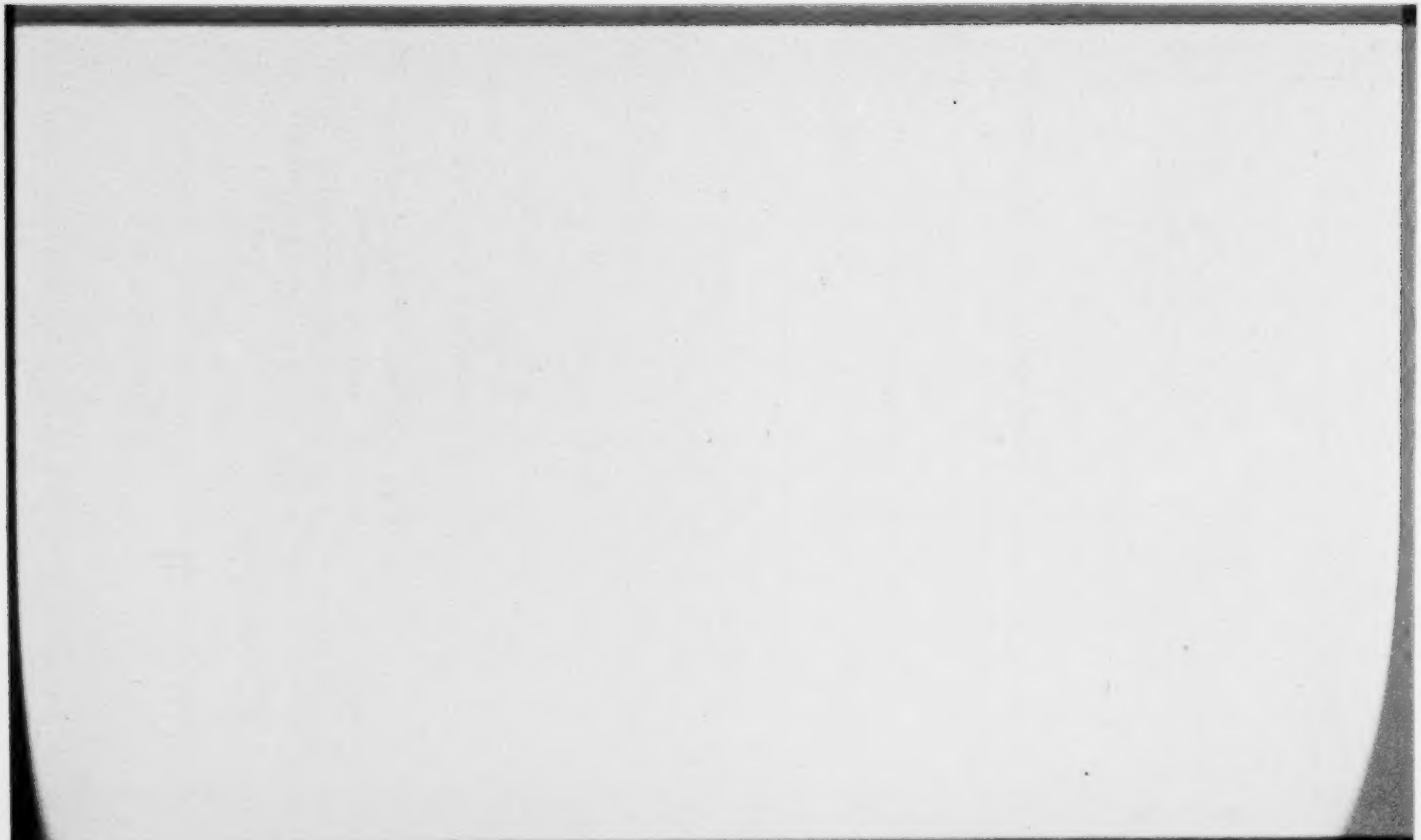
To say that an accused, charged with felony, may waive a right or consent to a conviction under plea of not guilty, is to place the credulous and timid at a disadvantage that no just administration of the law will sanction.

7. It is insisted, however, that accepting all of these propositions as true, plaintiff in error is not entitled to complain herein, because although a juror accepted by both parties was without just cause in the absence of the accused, excused by the court, that still if he finally obtained a jury that gave him a fair and impartial trial resulting, however, in a conviction, that he has not been prejudiced thereby. It is a principle of law so well established that new authorities thereon have ceased, that when a material right of the defendant is violated, that a conclusive presumption arises that he was prejudiced thereby. Not only the decisions of the State of Kentucky, but the fundamental statutory law recognizes this principle, and the direct question where a juror accepted and has been excused, has been decided by the courts of the State, and in the case of Crowley vs. The United States, recently determined, this honorable court has recognized this doctrine, and it is not thought necessary to argue or cite authorities to sustain the proposition that where a known right has been violated that the accused must establish the fact that he has been prejudiced in order to obtain redress.

Respectfully submitted,

W. M. SMITH,

Attorney for James B. Howard, Plaintiff in Error.



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Office Supreme Court U. S.
FILED
AUG 14 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905

NO. 238-47

JAMES B. HOWARD, ... Plaintiff in Error,
versus
THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief of N. B. HAYS, on behalf of the Commonwealth.

N. B. HAYS,
Attorney General.

CHARLES H. MORRIS,
Of Counsel.

Geo. A. Lewis Publishing House Print.

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Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS

COMMONWEALTH OF KENTUCKY, Defendant in Error.

BRIEF FOR COMMONWEALTH OF KENTUCKY.

On January 30th, 1900, Hon. William Goebel, while on his way to the Senate Chamber, in Frankfort, Franklin county, Kentucky, was shot on the State Capitol grounds, by an assassin, concealed in the Executive building, located thereon.

He died from the effects of said gun-shot wound, on February 3rd, 1900.

On April 17th, 1900, the plaintiff in error, together with others, was indicted by the grand jury of Franklin county, Kentucky, for the willful murder of said Goebel.

(R., 1.)

Plaintiff in error was tried and convicted in 1900, and his punishment fixed at death. He prosecuted an appeal to the Kentucky Court of Appeals, and obtained a reversal of said judgment.

(Howard v. Commonwealth, 110 Ky., 356.)

He was tried and convicted the second time in 1902, and his punishment was fixed at confinement in the penitentiary for life. He prosecuted a like appeal and obtained a like reversal.

(Howard v. Commonwealth, 114 Ky., 372.)

He was tried and convicted the third time in April, 1903, and his punishment on this trial was fixed at confinement in the State penitentiary for life. He filed motion and reasons for a new trial (R., 47), which motion was overruled; and from which ruling of the Court, he prosecuted an appeal to the Kentucky Court of Appeals.

During the trial, the Commonwealth challenged the juror, Alexander, for cause after he had been tested and accepted by both parties, but before the jury was sworn. The Court having sustained said challenge and discharged said Alexander over the objection of plaintiff in error, the same is relied on by plaintiff in error for review here. The special bill of exceptions as to the same, and the orders of the trial court, are as follows:

"COMMONWEALTH OF KENTUCKY, Plaintiff,
"VERSUS } Order.
"JAMES B. HOWARD, Defendant.

"Commonwealth's attorney Franklin came into the Court, and — the presence of the accused and his counsel, stated that he had a matter he desired to bring to the attention of the Court, away from the presence of the jury. *Thereupon the Court, counsel for the Commonwealth, the defendant in person, and his counsel retired to the county judge's office.* Thereupon the attorney for the Commonwealth filed the affidavit of Ben F. Hackett, and for reasons therein shown, moved the Court to discharge juror

J. C. Alexander from service as a juror on the trial of this case, *to which motion defendant by counsel objected and argument of counsel on both sides being heard upon the objection it was agreed by counsel on either side that the Court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit,* that he said to Hackett while in the custody of the sheriff, 'Hello, Ben, I am glad they cut you off of this jury as I did not want to serve on this jury with you,' and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the Court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the Court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged; and the Court being thus advised, *overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel excepts.* Thereupon the *defendant* moved the Court to discharge the entire panel remaining, which was objected to by attorney for the Commonwealth, and the Court being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel excepts."

(R., 32.)

The affidavit referred to reads as follows:

"COMMONWEALTH OF KENTUCKY,
"VERSUS
"JAMES B. HOWARD.
} Affidavit of Ben Hackett.

"This affiant, Ben Hackett, says that after the killing of William Goebel, he and Mr. J. C. Alexander, who had been accepted on the jury to try the case, had many conversations and arguments about

the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel among those — were charged with this murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him; these arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel, were frequent and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

"This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case and after the affiant had been excused—after those accepted as jurors had been charged and admonished by the Court and immediately after the adjournment for supper and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were passing out through the court house yard, when in passing Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'

"Affiant Ben Hackett says the foregoing statements are true.

"BEN HACKETT.

"Subscribed and sworn to before me by Ben Hackett, this April 10, 1903.

"JAS. H. POLSGROVE,
"Co. Judge Franklin Co."

(R., 32, 33.)

The bill of exceptions on said challenge is as follows:

"Franklin Circuit Court.

"COMMONWEALTH OF KENTUCKY, Plaintiff,
"VERSUS
"JAMES B. HOWARD, Defendant.
} Bill of Exceptions.

"Be it remembered:

"That on the trial of this case on the 10th day of April, 1903, there had been tested and accepted by both Commonwealth and defendant herein, eleven jurors, *J. C. Alexander* being one of them, and the twelfth juror had been called and qualified himself as a competent juror.

"Thereupon the Commonwealth's attorney, together with the attorney assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterwards returned into Court and filed the affidavit of Ben Hackett, which is as follows:

* * * "The affiant, Ben Hackett, says that after the killing of William Goebel he and *Mr. J. C. Alexander, who has been accepted on the jury to try this case, had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him—these arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel—were frequent, and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.*

"This affiant further says that on yesterday afternoon late after Mr. Alexander had been accepted as a juror to try the case and after this affiant had been excused, after those accepted *as jurors had been charged and admonished by the Court, immediately after the adjournment for supper and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were*

passing out through the court house yard, when in passing Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'

"Affiant Ben Hackett, says the foregoing statements are true.

(Signed) "BEN. F. HACKETT.

"Subscribed and sworn to before me by Ben Hackett, this April 10, 1903.

"JAS. H. POLSGROVE,
"Co. Judge Franklin Co.

"And moved the Court for *reasons* shown in said affidavit to discharge said *J. C. Alexander* from service as a juror on the trial of this case, to which *the defendant by counsel at the time objected and the Court overruled said objection and discharged said Alexander from service as a juror herein, to which defendant at the time excepted, and still excepts.* That at the time said motion was entered, and said Alexander was so discharged, the Commonwealth had exhausted of its peremptory challenges three, and the defendant had exhausted of his peremptory challenges twelve. *That on said motion to discharge said Alexander, and before he was discharged by agreement with counsel on either side, the Court privately examined said Alexander as to the truth of the* CHARGES *as to what he said, to said Hackett while he, Alexander, was in the custody of the sheriff; and the Court thereupon being advised, discharged said Alexander as stated,* to all said rulings of the Court defendant objected and excepted, and objects and excepts, and files this said bill of exceptions, duly signed and approved by the Court.

"JAMES E. CANTRILL, Judge."

(R., 33, 34, 35.)

Said motion and reason for a new trial, are as follows:

"Defendant, James Howard, moves the Court to set aside the verdict herein and grant him a new trial, because he says his substantial rights have been prejudiced herein by reason of the following errors

committed and proceeding had upon his trial, to-wit:

"1st. Because the Court erred in overruling the motion of defendant made herein to require that the one hundred and fifty jurors ordered to be summoned from the county of Woodford, be drawn from the wheel or drum in said county as is required by law in the selection of jurors in said county when the regular panel is exhausted, to which ruling the defendant at the time excepted.

"2nd. Because the Court erred in discharging and excusing J. C. Alexander for service herein as juror after he had been accepted, and also in overruling the motion then made by defendant herein to discharge the entire panel so far as then accepted, to all of which the defendant at the time excepted.

"3rd. Because the Court erred in overruling defendant's motion made herein on April 15th, 1903, to set aside the swearing of the jury, and continue the case to the next term of the Court, to which the defendant at the time excepted.

"4th. Because the Court erred in overruling the defendant's motion to permit him to re-examine witness Henry E. Youtsey, who had been sworn and testified in this case as a witness for the Commonwealth.

"5th. Because the Court erred in overruling the motion to strike from testimony of various witnesses heard herein, certain testimony and statement set out in said motion, to which defendant excepted.

"6th. Because the Court erred in overruling motion of defendant herein to strike from the testimony of Henry E. Youtsey, witness heard herein, certain testimony and statement fully set forth in said motion, to which the defendant excepted.

"7th. Because the Court erred in overruling motion of defendant to exclude and withdraw from

the jury certain statement, testimony of witnesses Chas. Day and D. A. Jones, to which defendant excepted.

"8th. Because the Court erred in failing and refusing to give the jury instructions Nos. one, two, three, four and five offered by defendant herein, and in failing and refusing to give each and every one of said instructions, to all of which defendant at the time excepted.

"9th. Because the Court erred in giving to the jury, over defendant's objection and exceptions, instruction Nos. one, two, three, four and five, and each and every one of said instructions, to all of which the defendant at the time excepted.

"10th. Because the Court erred in permitting Hon. Thos. Campbell, one of the attorneys for the prosecution, to state to the jury in his argument that there had been previous trials in this case, and in referring to the verdicts that were rendered on said trials, and upon objection being made by defendant's attorneys to said statement and argument, the Court erred in failing to tell the jury to disregard the same, and in not withdrawing same from them, to all of which the defendant at the time excepted.

"11th. Because the Court erred in permitting Hon. Robert Franklin, the Commonwealth's attorney, to state to the jury in his concluding argument as follows: 'Jim,'—meaning the defendant—'you have always been the tool of John G. White and Bev. White, and you are the tool of them now.' To which the defendant at the time excepted, and the Court erred in failing to exclude said statement from the jury, and charging them to disregard said statement.

"12th. Because the Court erred in permitting the Commonwealth to introduce and have sworn Henry E. Youtsey as a witness herein, and in permitting him to testify herein, when his name was not at the foot of the indictment and was not called when the wit-

nesses were called and placed under the rule, and not put upon the stand until all of the witnesses for the Commonwealth in chief had testified except one.

"13th. Because the Court erred in overruling the motion of defendant to exclude certain statement in the testimony of Frank Cecil, a witness herein, which statements are fully set forth in the motion of defendant filed in this case, and to the overruling of which motion the defendant at the time excepted.

"14th. Because the Court erred in admitting the testimony of various witnesses sworn herein, which statement and testimony was objected to at the time by the defendant, and exceptions reserved, which is fully shown by a stenographic report of the evidence herein, and the Court erred in excluding testimony and statement of certain witnesses offered herein by the defendant and to which ruling of the Court the defendant excepted, as is shown by said stenographic report of the testimony.

"15th. Because the Court erred in overruling the motion of defendant to require the Commonwealth's attorney to permit the defendant or his attorney to examine the written statement called the confession of Henry E. Youtsey, and the notes of the evidence given before the grand jury, or to furnish them a copy of same.

"16th. Because the verdict herein is against the law and the evidence heard in the case.

"17th. Because the Court erred in failing to give the jury the whole law of the case as applicable to the charge made and the evidence heard herein.

"18th. Because the Court erred in failing to instruct the jury to the extent and the circumstances under which evidence all acts and declarations of co-conspirators were to be received against the accused, or how far or under what circumstances the

jury could consider such testimony of the acts and doings of co-conspirators as against the defendant.

"19th. Because the Court erred in ruling that the party, Green Golden, introduced as a witness in behalf of the defendant could not be compelled to testify in the case, and in refusing to permit the defendant's attorneys to interrogate said witness as to any matter relative to the case, and especially the facts set out in the bill of exceptions filed herein on April 23rd, 1903.

"20th. Because the Court erred in refusing to permit the defendant's attorney to examine the witness, Mrs. H. E. Youtsey, and in refusing to permit her to testify in the case, she being introduced and sworn in behalf of the defendant herein, to which the defendant at the time excepted.

"21st. And finally the defendant moves the Court to set aside the verdict herein and to grant him a new trial because he says he has not had a fair and impartial trial for the following additional reasons:

"That the defendant was misled and prevented from procuring an impartial, unprejudicious and competent jury for the trial of his case, by the answers and statements of Runyon Renshaw and Carter C. Neal, upon the examination for qualifications of jurors."

(R., 47.)

And which answers and certain affidavits are shown in full in the record on pages 50 to 60, inclusive, of the transcript of record.

Said judgment was affirmed by the Court of Appeals, on April 22, 1904, and is as follows:

"*Opinion of the Court by Judge Settle.*

"The appellant, James B. Howard, was tried and

convicted the third time in the Franklin Circuit Court under an indictment returned in that Court against him and others, charging them with the murder of William Goebel, and his punishment fixed by the verdict of the jury and sentence of the Court at imprisonment in the penitentiary for life.

"His motion for a new trial was overruled by the lower court, and by this appeal he seeks a reversal of the judgment of conviction.

"There have been two former appeals herein. (See Howard v. Commonwealth, 22 L. R., 1845; Same v. Same, 24 L. R., 1225.) As the principal facts connected with the crime for which appellant was convicted were stated and commented on in the opinions of this Court on the former appeals, we deem it unnecessary to enter upon a recital of them in this opinion. Suffice it to say that the evidence shows that Hon. William Goebel, on January 30th, 1900, in Frankfort, and on the Capitol square, while approaching the main entrance of the State House, was shot and wounded by some one in concealment, of which wound he in a short time thereafter died. It has been and is the theory of counsel for the Commonwealth that the bullet which deprived him of his life was fired by the appellant, though others are charged and jointly indicted with him as aiders and abettors in the crime.

"There were 21 grounds for a new trial filed by appellant in the lower Court, several of which were relied on by him on the former appeals, and were then held by this Court insufficient to authorize a reversal. It will, therefore, be unnecessary for us to again consider such of them as were then determined. Indeed we feel called upon to discuss and pass upon only such of the grounds for reversal as were urged by counsel for appellant in argument before us, and will consider them in the order in which they were presented.

"First. It is contended that the Court erred in the formation of the jury, in that by its order for the

summoning of 150 jurors from the county of Woodford, it was not required that they be drawn from the jury wheel or drum of that county, but only that they be summoned from the county at large by the sheriffs of Franklin county.

"In Curtis v. Commonwealth, 23 L. R., 267, it was held that the manner of selecting the jury in that case was error, but as section 281 of the Criminal Code of Practice provides that, 'The decisions of the Court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motion for a new trial, shall not be subject to exception,' this Court is without power to revise such an error. In several cases subsequently decided, the most recent being that of Turner v. Commonwealth, the opinion in which is yet unpublished, the rule announced in Curtis v. Commonwealth, *supra*, was adhered to and approved. We find it unnecessary, therefore, to decide whether or not there was error in the manner of summoning the jury or in its formation, as a reversal by this Court upon that ground, even if such error had been committed, would be unauthorized. Another alleged error complained of by appellant was the discharge by the trial Court of the juror J. C. Alexander.

"It appears that he and ten others had been accepted by the parties as jurors, and that but one other was to be selected in order to complete the panel of twelve. The Commonwealth had then exhausted three of its peremptory challenges, and the appellant twelve of his, though neither party had been required to, or had, exercised the right of peremptory challenge, except as there were twelve men in the jury box, who had upon the *voir dire* been found qualified. At this point it was suggested to the Court by the Commonwealth's attorney, out of the hearing of the jury, that had thus been partly made up, that he had just received information to the effect that J. C. Alexander had theretofore formed and expressed an opinion as to the merits of this case, and

with respect to the crime charged in the indictment, and had after he was accepted on the jury, improperly conversed with a person, not a member of the jury, on a subject connected with the case, notwithstanding the previous admonition of the Court not to do so. This communication of the Commonwealth's attorney was immediately followed by a motion from him to discharge Alexander from the jury, in support of which was filed the affidavit of Ben. Hackett, who had himself been excused as a juror in the case.

"It was stated in the affidavit, in substance, that the affiant and Alexander, after the death of William Goebel, had many conversations and arguments about the killing, in which affiant contended that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Alexander expressed and urged the opinion that there had not been such a conspiracy. That in these conversations both affiant and Alexander manifested much earnest interest and feeling. And further, that after Alexander and some other members of the jury had been accepted, put in charge of the sheriff and admonished by the Court, he said to the affiant. after adjournment on the day before the filing of the affidavit and as the jury were passing out through the court house yard, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'

"Before passing upon the motion of the Commonwealth's attorney, the Court privately examined Alexander, while the latter was in the custody of the sheriff, touching the truth of the charges contained in the affidavit of Hackett, and as the result of such examination, discharged him from the jury. It was stated by counsel for the Commonwealth in the oral argument and by brief in this Court, and not denied in the oral argument or brief of counsel for appellant, that the examination of Alexander was conducted privately by the Court *at the request of coun-*

sel for appellant, made in the latter's presence and with his consent. Be that as it may, in ascertaining what transpired in the lower court in this case, we must look to and be governed by the record made therein, and it appears from the record that the privy examination of Alexander was made by consent of the parties, though it further appears that appellant at the time of the discharge of Alexander, excepted to such discharge, and moved the Court to also discharge the ten persons remaining of the jury, which the Court refused to do, but proceeded to complete the jury, subject to the right of challenge by either party to the extent of the challenges remaining to them, by selecting from the persons summoned from Woodford county for that purpose the two necessary to complete the panel of twelve.

"As what occurred in the privy examination of Alexander does not appear in the bill of exceptions, we are unable to know whether he admitted or denied the statements made in the affidavit of Hackett, except that it does appear in the bill of exceptions that he made the admission—presumably before the privy examination—that he said to Hackett after the latter had been excused from the jury, and he had been accepted as a member thereof, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you,' but claimed that it was made in a jocular way.

"It is insisted for the Commonwealth that Alexander's admission as to the above statement warrants the conclusion that what was said in the affidavit of Hackett, as to arguments between Alexander and himself, involving the merits of this case, is true, otherwise what reason did Alexander have for not wishing to serve with Hackett on the jury?

"In this view of the matter it is argued that the action of the lower court, in discharging Alexander from the jury, was not an abuse of discretion. Upon the other hand, it is insisted for appellant that it was error for the Court to examine Alexander in

his absence, and that he could not legally waive his right to be present at such examination. In support of this contention section 183, Criminal Code, is relied on, which provides: 'If the indictment be for a felony, the defendant must be present and shall remain in actual custody during the trial.' * * *

"While this Court in construing the section, *supra*, has repeatedly held that one charged with the commission of a felony can not be tried during his absence from the court room, we find that cases have arisen in which it has been deemed necessary to relax that rule. Thus in Hite v. Commonwealth, 14 L. R., 308, it was held that the occasional absence from the court room of the accused, on account of temporary illness for a new minutes at a time, the trial continuing in his absence, did not prejudice the substantial rights of the accused. In Meece v. Commonwealth, 78 Ky., 586, it appeared that after the submission of the case to the jury and their retirement to the jury room they returned into Court and asked for further instructions. The Court declined to give any, but in the presence of counsel for the prisoner inserted by interlineation certain words in one of the instructions. The accused was absent at the time, and it was urged in his behalf that for this reason the judgment should have been reversed. This Court, however, held otherwise, in doing which it said:

"'While we recognize the fact that the accused when on trial for a criminal offense should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence, either before or after the submission of the cause to the jury, still this Court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the Court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged

with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist, except by the legislation of the State on the subject, and when permitting an appeal the law-making power has the right to determine for what cause a reversal may be had.' * * *

"It has also been held by this Court that a trial for felony begins when the jury is sworn. (Willis v. Commonwealth, 86 Ky., 68.) At the time the examination of Alexander took place, and when he was discharged, the jury had not only not been sworn, but it had not been completed. There are many rights, some of them guaranteed by the Constitution, which one charged with a crime may not waive, and should not be permitted by the courts to waive. Such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and the cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in Court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the Court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jurors to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury.

"It is, however, beyond our province to reverse this case for error, if there were any, in excluding Alexander from the jury. Our right to do so is expressly forbidden by section 281 of the Criminal Code, and we have already referred to Curtis v. Commonwealth, 23 L. R., 267, and Turner v. Com-

monwealth (yet unpublished) to indicate this Court's construction of that section. In addition to those cases, a further recent authoritative utterance of this Court to the same effect will be found in Alderson v. Commonwealth, 25 L. R., 32, in which one of the grounds for reversal, as set forth in the record, was that the appellant, over his objection at the time, was forced by the trial court to accept as jurymen persons alleged to have formed an opinon as to his guilt or innocence.

"Another alleged error was that after the Commonwealth had accepted in open court the full panel of twelve jurymen, and after they had been passed to the appellant for acceptance or peremptory challenge, and he and his counsel had retired from the court house to pass upon the panel, the Court over appellant's objection permitted the Commonwealth to object to and excuse one of the jurymen without cause, though the whole twelve had been accepted by it. Whereupon appellant, as was done in the case at bar, moved the Court to dismiss the entire jury, which motion was overruled. In passing on the question thus presented this Court, after quoting section 281 of the Criminal Code, *supra*, said:

"'In construing this section we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal.'

"Whatever may be the rule in other States, this question has been settled in Kentucky as herein indicated, and the authorities cited are the latest that have emanated from this Court.

"Another complaint of the appellant is the refusal of the lower court to require the Commonwealth's attorney to permit him to examine an alleged original statement called the confession of H. E. Youtsey, and the notes of the evidence given by him before the grand jury. The motion of appellant for those papers was based upon his affidavit. A response to the motion was filed by the Common-

wealth's attorney, in which it was denied that he had, or knew anything of the alleged confession, but that he did have notes of Youtsey's testimony before the grand jury, which he refused to surrender. The Court ruled correctly in refusing to require the surrender by the Commonwealth's attorney of the notes of Youtsey's testimony given before the grand jury, as was decided by this Court in Franklin v. Commonwealth, 20 L. R., 1137. In the opinion of which it is said:

"'It appears from the record that the grand jury reduced to writing the testimony of the witnesses before it and furnished to the Commonwealth's attorney the evidence so taken. * * * It was the duty of the foreman of the grand jury, also under the statute, to communicate to the attorney for the Commonwealth when requested, the substance of the testimony before them. But we do not think the Court below should in the exercise of sound discretion have required the Commonwealth's attorney to communicate to the defendant the evidence so reported to him by the foreman of the grand jury.'

"Appellant also complains that the Court refused to compel Green Golden to give certain testimony demanded of him. It appears from the record that Golden was jointly indicted with appellant and others for the murder of William Goebel, and that the prosecution therefor is still pending against them. Golden was introduced by appellant, and after certain preliminary questions, without objection from the Commonwealth, or suggestion from the Court, he announced that he had been indicted in this case, but had not been tried, and claimed his privilege, and he was not required to testify, upon the ground that he could not do so without giving evidence against himself.

"In Roberson's Criminal Law, volume 2, section 980, it said:

"'It is a rule that no person is bound to answer any question, if the answer thereto, would in the

opinion of the trial judge, have a tendency to subject the witness, or the wife or husband of the witness, to any punishment, penalty or forfeiture. And the witness may claim the protection at any stage of the inquiry, whether he has already answered the question in part or not at all. If the fact to which he is interrogated forms but one link in the chain of evidence which is to connect him, he is still protected. The privilege is one personal to the witness and to be exercised by him alone, and counsel will not be allowed to make the objection. Nor can the witness be made to explain how he might be criminated by the answer, as this would strip him of the privilege which the law allows him. But it is not enough for the witness to say that the answer will criminate him. He is not the sole judge of the fact. It is for the Court to determine from all the circumstances whether there is really reasonable ground to apprehend danger to him from his being compelled to answer.' (Burdett v. Commonwealth, 93 Ky., 79; 1st Greenleaf, section 451.)

"Chief Justice Marshall in the trial of Aaron Burr said:

"'If the question be of such description that an answer to it may or may not incriminate a witness, according to the purport of the answer, it must rest with himself, who alone can tell what it would be to answer the question or not.'

(Burr's trial 224.)

"From these authorities, the statements of Golden, and his reasons for not testifying, it was manifest that he is entitled to avail himself of the privilege allowed by law, and the Court properly excused him from testifying. It is insisted for appellant that it was error for the trial court to refuse him permission to recall and further cross-examine H. E. Youtsey. It will be found that the direct examination of Youtsey comprises ten pages of volume three of the bill of evidence, and the first cross-examination one hundred and eighty pages of that volume. On

the first cross-examination he appears to have been on the stand about two days, at the end of which, viz: April 17th, the cross-examination was suspended, and the appellant given until April 20th, to prepare for his further cross-examination. On April 21st, he was again cross-examined at great length, and finally dismissed. On April 23rd, appellant asked to be allowed to recall and still further cross-examine Youtsey, for the purpose of laying the foundation to contradict him by his wife As will be presently shown, the expected contradiction would, if permitted, have been incompetent, but aside from this consideration, after such a long and exhaustive cross-examination as was given the witness, covering, as it would seem, every possible aspect of the case and the witness' relation thereto, we are unwilling to say that it was an abuse of discretion for the Court under the circumstances to refuse to permit him to be recalled for the third time for still further cross-examination.

"We are of the opinion that the Court properly excluded the testimony of Mrs. Youtsey, wife of H. E. Youstey. Section 606, Civil Code of Practice, provides:

"'Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage, &c.' * * *

"In Commonwealth v. Sapp, 90 Ky., 585, it was said by this Court:

"'If the proposed testimony violates married confidence in the slighest degree, or tends however slightly to impair the rule for its protection, the highest considerations forbid its introduction.'

"It will be found that the authorities are uniform in holding that this rule applies, whether such proposed testimony is sought to be introduced in a case

where the husband or wife is party, or only others are concerned.

"In Scott v. Commonwealth, 94 Ky., 511, in an able discussion of this doctrine by Judge Lewis, it was held that a letter to the wife from the husband in relation to a crime with which he was charged, could not be used in evidence by the Commonwealth, and the case was reversed because of its introduction as evidence therein. Applying that rule in this case, the note or letter proposed to be identified by Mrs. Youtsey, as well as any other testimony that she might have given in regard thereto, was clearly incompetent, because the same came to her from her husband by reason of the privacy and confidence of the marital relation, and the use of it to contradict him, would have been as fully within the reason, and as much against the policy of the law, as would any other confidential disclosure that he may have made to her. And the same rule that forbade her testifying in this case, would have excluded as incompetent, any statement from him made to her on the same subject.

"Objection is made that the trial court refused to exclude certain testimony of H. E. Youtsey and Frank Cecil, and also the testimony of Jones and Day. We find that such of the testimony of Youtsey as appears to be incompetent was rejected and stricken out by the Court. We think all the testimony of the four witnesses named, as it is shown by the bill of evidence to have been admitted by the Court, was competent. It related to acts and declarations of the appellant, conducing to establish his guilt, as well as a conspiracy to take the life of William Goebel, in which he was an alleged participant and principal. The testimony in question is of the nature, and similar in character, to much of the evidence held by this Court on the former appeals in this case, and in the several appeals of Caleb Powers, to be competent.

"It is to be borne in mind that the principal wit-

nesses against appellant, and the only ones who claimed to have personal knowledge of his guilt, were his accomplices, whose testimony it was necessary to corroborate as required by section 241, Criminal Code. In the very nature of the case, much of the corroborating testimony was necessarily circumstantial, and where, as in a case like this, such testimony must be relied upon, the evidence should be allowed to take as wide a range as would consist with justice and the well recognized rules obtaining with reference to the admission of such evidence. We are of the opinion, therefore, that while some of the evidence complained of, notably that of Jones and Day, is somewhat remote and even fragmentary, yet in as much as practically the same statements, which they claim to have overheard as coming from appellant, were testified to by the witness Stubblefield as having been made to him by appellant in a conversation about the same time in regard to the death of William Goebel, in which conversation, as stated by Stubblefield, appellant admitted that he had fired the shot which killed Goebel, we think the lower court did not err in permitting the testimony of Jones and Day to go to the jury.

"Appellant also complains of the instructions. But we find that the instructions conform absolutely to the rule laid down by this Court on the second appeal, and are, besides, free from error.

"A careful examination of the record having failed to disclose any error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

"Whole Court sitting.

"Chief Justice Burnam and Judge O'Rear dissent."

DISSENTING OPINION BY JUDGE O'REAR.

"I am unable to agree with the four members of the Court who hold that the presence of the ac-

cused in a felony trial can be dispensed with, even by his consent, during the empannelling of the jury, or at any other stage of the trial. (Bill of Rights Constitution, section 11; Criminal Code, section 183; Meece v. Commonwealth, 78 Ky., 586; Rutherford v. Commonwealth, 78 Ky., 642; Temple v. Commonwealth, 14 Bush, 769; Allen v. Commonwealth, 86 Ky., 642; Hopt v. People of Utah, 110 U. S., 574.)

"Nor can I agree that the evidence by Jones and Day of fragmentary conversations alleged to have occurred in Laurel county, between appellant and some other persons, when it is conceded that the portions detailed are incomplete and disconnected from what went before or followed, is relevant as admissions by the accused. (Berry v. Commonwealth, 10 Bush, 16; Terrell v. Commonwealth, 13 Bush, 246.)

"I concur with the majority of the Court that the rejection of the communication between Youtsey and his wife was prop

(R., 64-73.)

On June 7th, 1904, plaintiff in error filed his motion and petition for rehearing in the Court of Appeals of Kentucky, which are in words and figures as follows:

"MOTION FOR REHEARING.

"Comes the appellant, James B. Howard, and moves the Court to set aside the judgment of affirmance herein and to withdraw its opinion rendered on April 22, 1904, and grant him a rehearing herein, for the following reasons:

"1. He says that said decision is in *conflict* with the *Constitution of the United States, and also the State of Kentucky, as well as the statutes of said State* applicable in said case.

"2. That said decision is in *conflict and derogation of the common law operative in this State.*

"3. He says that same is in violation of his rights *under the Constitution of the United States, and especially under the fourteenth amendment thereof,* because the ruling therein deprives him of his liberty without due process of law, and denies to him the equal protection of the laws.

"4. He says that *same is in violation of his rights as guaranteed him under the fifth amendment of the Constitution of the United States,* because it deprives him of his liberty without due process of law.

"5. He says that same is in violation *of the Constitution of the United States and in derogation of the common law, and more especially the sixth amendment of said Constitution,* because in the examination of said juror, J. C. Alexander, same was had by the Court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the Court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant.

"6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

"'Section 281. What not subject to exception—The decisions of the Court upon challenges to the panel (a) and for cause (b) upon motion to set aside an indictment (c) and upon motions for a new trial (d) shall not be subject to exception.'

"Is in conflict with the rights of the defendant under the Constitution of the United States as well as the Constitution of Kentucky, and the common law obtaining in this State, and *more especially in violation of sections five, six and fourteen of said*

Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in case of felony.

"7. He says that the construction given by the Court in said opinion, of section 281, is erroneous and prejudicial to his rights, in this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

"8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence of the defendant, and not to challenges made or heard either in the absence of said defendant or after the juror had been selected and accepted by both the Commonwealth and defendant, but he says that in the event said section is construed by this Court to apply to said State of case, then, that same is in conflict with the Constitution of the United States, and the common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

"9. He says that as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case, that the Court may have a discretionary power over said juror before he is sworn, but there is a limitation upon said discretion, and that he can not discharge him over the objection of the defendant simply because he has committed a contempt of Court, as the Court has the power to fine him, or otherwise punish him for same, but not to deprive defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark.

"He says that all of said rulings complained of, were and are prejudicial to his rights herein, and he herewith files in support of this motion a petition for a rehearing in this case, and he prays that same may be granted and that said opinion may be set aside or modified, and he asks for all other necessary and proper relief, the premises being considered."
(R., 74.)

PETITION FOR REHEARING.

"Your petitioner, James B. Howard, by his attorney, respectfully asks this Court to set aside or modify the judgment of affirmance herein, and to withdraw its opinion rendered on April 22, 1904, and grant him a rehearing for the reasons as are fully set out in his motion filed, which are as follows:

"1. He says that said opinion is *in conflict with the Constitution of the United States, and also the State of Kentucky, as well as the statutes of said State applicable in said case.*

"2. That said opinion is *in conflict and in derogation of the common law operative in this State.*

"3. He says that same is in violation of his rights *under the Constitution of the United States, and especially under the fourteenth amendment thereof,* because the ruling therein deprives him of his liberty without due process of law and denies to him the equal protection of the laws.

"4. He says that same is in *violation of the rights as guaranteed him under the fifth amendment of the Constitution of the United States,* because it deprives him of his liberty without due process of law.

"5. He says that same is in violation of the *Constitution of the United States and in derogation of*

the common law, and more especially the sixth amendment of said Constitution because in the examination of the juror, J. C. Alexander, same was had by the Court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the Court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant.

"6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

"'Section 281. *What not subject to exception*— The decisions of the Court upon challenges to the panel (a) and for cause (b) upon motions to set aside an indictment (c) and upon motions for a new trial (d) shall not be subject to exception.'

"Is in conflict with the rights of the defendant under the *Constitution of the United States as well as the Constitution of Kentucky and the common law obtaining in this State, and more especially in violation of sections five, six and fourteen of said Constitution of the United States,* because same deprives the defendant of the right of exception upon challenge to the panel, and for cause, upon the selection of a jury in a case of felony.

"7. He says that the construction given by the Court in said opinion, of section 281, is erroneous and prejudicial to his rights, in this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

"8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence — the defendant, and not to challenges made or heard, either in the absence of said defendant or after the juror had been selected and

accepted by both the Commonwealth and defendant, but he says that in the event said section is construed by this Court to apply to said state of case, then, that same is in conflict with the Constitution of the United States and common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

"9. He says that as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case, that the Court may have a discretionary power over said juror before he is sworn, but there is a limitation upon said discretion, and that he can not discharge him over the objection of the defendant, simply because he has committed a contempt of Court, as the Court has the power to fine him or otherwise punish him for same, but not to deprive the defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark."
(R., 75.)

Upon the petition for rehearing the Court of Appeals delivered the following response:

"The questions called to our attention in the petition for rehearing under the Constitution of the United States were considered by the Court on the original hearing, and we adhere to the conclusion there reached, that no right of appellant under the fifth, sixth or fourteenth amendment to the Constitution of the United States has been violated.
"The motion for rehearing is overruled."
(R., 78.)

Said petition having been denied, appellant by writ of

error, appealed to this Honorable Court, and assigned for review the following errors:"

(R., 88.)

"Court of Appeals of the State of Kentucky.

"JAMES B. HOWARD, Plaintiff in Error,
"VERSUS
"COMMONWEALTH OF KENTUCKY, Defendant in Error.
} Assignment of Errors.

"Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky, in the above entitled matter, there is manifest error in this, to-wit:

"1st. The Court erred in holding that James B. Howard on trial herein, charged with a felony, could, together with his attorney, before the jury was sworn, but after one of said jurors had been tested and accepted by both the Commonwealth of Kentucky, and said defendant, Howard, consent to the examination by the Court, separate and apart from defendant Howard and his attorney, of said juror who had been so accepted, against whom a complaint had been made, for the purpose of ascertaining whether or not he was qualified to retain his place as one of the jurors to try the case, and that said examination of said juror so had herein was not in conflict or in violation of the fourteenth (14) amendment of the Constitution of the United States of America or any clause thereof, and did not deprive plaintiff in error, James B. Howard, of his liberty without due process of law, or deprive him of the rights, privileges or immunities secured to him and other citizens of the United States and the State of Kentucky, and did not deny to him the equal protection of the law.

"2nd. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the fourteenth (14) amendment to the Constitution of the United States of America, and that it did not deny to plaintiff in error the equal protection of the law, or abridged his privileges and immunities secured to him by said amendments.

"3rd. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, title, privileges or exemptions exercised under the fourteenth amendment to the Constitution of the United States of America.

"4th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with or in derogation of the common law.

"5th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the 'law of the land,' and that it did not abridge the privileges and rights or immunities of said Howard secured to him as a citizen of the United States and State of Kentucky, or deprive him of the equal protection of the law.

"6th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was and is due process of law, and that it did not deprive said James B. Howard of his liberty without due process of law.

"7th. The Court erred in holding herein that its said ruling, as set forth in assignment No. 1 herein, was not repugnant to or in conflict with the statute

of the United States of America, and the authority exercised thereunder.

"8th. The Court erred in holding that the record must affirmatively show that an injury resulted to the substantial rights of said James B. Howard, by the dismissal, by the Court, of J. C. Alexander from the panel of said jury after he had been tested and accepted by both the Commonwealth of Kentucky and said Howard, and in holding that said ruling did not deprive said Howard of the equal protection of the law.

"9th. The Court erred in holding that its said ruling as set forth in assignment No. 8, was due process of law, and that defendant was not thereby deprived of his liberty without due process of law.

"10th. The Court erred in holding that it, the said Court, was expressly forbidden, by reason of section 281 of the Criminal Code of Practice of the State of Kentucky, from reversing said case for an error committed by the trial court, in dismissing said Alexander from said panel of the jury after he had been accepted by both the Commonwealth of Kentucky and the defendant, James B. Howard, and in holding that said ruling did not abridge the privileges and immunities of said Howard as a citizen of the United States.

"11th. The Court erred in holding that its said ruling, as set forth in assignment No. 10 herein, was or is due process of law, and that it did not deprive said Howard of his liberty without due process of law.

"12th. The Court erred in holding that by reason of section 281 of the Criminal Code of Practice of the State of Kentucky, was without power to revise an error committed by the trial court in the manner of the formation or selection of the trial jury, and

in holding that said ruling did not abridge the rights, privileges and immunities of said plaintiff in error.

"13th. The Court erred in holding that its said ruling, as set forth in assignment No. 12 herein, was due process of law, and in holding that it did not deprive said Howard of his liberty without due process of law, and that it did not deprive him of the rights, privileges and immunities secured to other citizens of the United States of America and the State of Kentucky.

"14th. The Court erred in holding that section 281 of the Criminal Code of Practice of the State of Kentucky, or the authority exercised thereunder, is not in conflict with or in violation of the fourteenth (14) amendment of the Constitution of the United States or any clause thereof, and that said section does not abridge the rights, privileges or immunities, secured to plaintiff in error as a citizen of the United States of America and State of Kentucky, and in holding that it does not deny him due process of law and is not in conflict with 'the law of the land.'

"15th. The Court erred in holding that the enactment by the State of Kentucky, of said section 281 of its Criminal Code of Practice, was not the making of a law that was in conflict with or a violation of the fourteenth amendment of the Constitution of the United States of America or any clause thereof, or the common law, and that it did not abridge the privileges or immunity of said Howard secured to him.

"16th. The Court erred in holding that the authority exercised under said section 281 of said Code, and the construction given said section 281 by the courts of said State of Kentucky, and enforced herein, was not in conflict with or a violation of the fourteenth amendment to the Consitution of the

United States of America, or the common law, and that it did not abridge the rights, privileges and immunities of said Howard secured to him.

"17th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not in conflict with or repugnant to the right secured to plaintiff in error herein, by the eleventh (11) section of the 'Bill of Rights' in the Constitution of the State of Kentucky, 'to be heard by himself and counsel,' and 'to meet the witnesses face to face.' and was not in conflict with or repugnant to 'the law of the land,' or the common law.

"18th. The Court erred in holding that the enactment by the State of Kentucky of said section 281 of its Criminal Code of Practice, was not in conflict with or derogation of the 'law of the land.'

"19th. The Court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the fifth (5) amendment to the Constitution of the United States of America, as depriving plaintiff in error of his liberty without due process of law.

"20th. The Court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the sixth amendment to the Constitution of the United States of America, or the clause thereof, giving, in criminal prosecutions, the accused the right to be heard by himself and counsel, and to be confronted with the witnesses against him.

"21st. That the Court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the fifth

(5) amendment to the Constitution of the United States of America.

"22nd. The Court erred in holding herein that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the sixth amendment to the Constitution of the United States of America."

I.

QUESTION.

The principal question before this Honorable Court is whether the Federal Constitution has been violated in the trial of the plaintiff in error, or by the decision of the highest State court having jurisdiction of the questions assigned as errors.

In other words, did the State of Kentucky in the trial of the plaintiff in error, go beyond her powers? Was he, by her laws, or as they were administered during his trial, deprived of his liberty without due process of law, or was he denied the equal protection of her laws, prohibited by the 14th amendment to the Federal Constitution?

This contention of plaintiff in error is based upon the claim that he was prejudiced in his substantial rights on his trial—

1. In the discharge of J. C. Alexander from the jury, over his objection.

2. In the construction given section 281 of the Criminal Code of Practice of Kentucky, by the Appellate Court.

It is the contention of the Commonwealth that neither proposition is sound.

II.

CITIZENSHIP.

There is a dual citizenship under the Constitution and laws of the United States, and the Constitution and laws of the State.

The privileges and immunities of a citizen of the

United States are quite different, and in many particulars very distinct, from the privileges and immunities of citizens of the several States.

In the prosecution of an accused in any United States District or Territorial Court, for a violation of the criminal and penal laws of the United States, the accused may invoke the sovereign power of the Federal Government, through its judicial agency, that he be not deprived of a privilege, or an immunity under its Constitution and laws, without due process of law; and that he have the equal protection of the law.

These are the privileges and immunities which are guaranteed the Federal citizen under the 5th and 6th amendments to the Federal Constitution; but neither has any application to the privileges and immunities of an accused in a State court for a violation of the criminal and penal laws of such State. *Here he must invoke his constitutional and statutory rights of the State;* and the 14th amendment of the Constitution of the United States prohibits such State from depriving him of his liberty without due process of law, or denying him the equal protection of her laws.

III.

THE 5TH AND 6TH AMENDMENTS OF THE FEDERAL CONSTITUTION DO NOT APPLY.

The plaintiff in error was on trial in a State court, on a criminal charge for a violation of its laws.

The fourth and fifth reasons assigned in his motion and petition for a rehearing, and now urged here, read:

"4. He says that same is in violation of the rights as guaranteed him under *the fifth amendment of the Constitution of the United States,* because it deprives him of his liberty without due process of law.

"5. He says that same is in violation of the Constitution of the United States and in derogation of the common law, *and more especially the sixth amendment of said Constitution,* because in the examination of said juror, J. C. Alexander, same was had by the Court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the Court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant."

This Honorable Court has so often decided that these amendments to the Federal Constitution do not apply to a criminal prosecution in a State court for the infraction of its criminal laws, we scarcely deem it necessary to consider these assigned errors; and after having cited the following cases, we shall dismiss these errors from further consideration:

U. S. v. Cruikshank, 92 U. S., 542 (23-590).

Ex parte Spies, 123 U. S., 131 (31-86).

Brown v. New Jersey, 175 U. S., 175 (44-120).

Maxwell v. Dow, 176 U. S., 593 (44-602).

West v. Louisana, 194 U. S., 261 (48-969-70).

In the case of U. S. v. Cruikshank, 92 U. S., 542 (23-590), the Court said:

"The people of the United States, resident within any State, are subject to two governments: one State and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established

for different purposes and have separate jurisdictions."

In Ex parte Spies, 123 U. S., 131 (31-86), it was said:

> "The first ten articles of the amendments were not intended to limit the powers of the State Government in respect to their own people, but to operate on the National Government alone, was decided more than a half a century ago, and that decision has been steadily adhered to since. * * * Interpreted in this way, the statute is not materially different from that of the territory of Utah, which we had under consideration in Hopt v. Utah, and to which we then gave effect. As that was a territorial statute, passed by a territorial legislature, for the government of a territory over which the United States had exclusive jurisdiction, it came directly within the operation of article 6 of the amendments, which guaranteed to Hopt a trial by an impartial jury. No one at that time suggested a doubt of the constitutionality of the statute, and it was regarded both in the territorial courts and here as furnishing the proper rule to be observed by the territorial court in empanneling an impartial jury in a criminal case."

In the case of Brown v. New Jersey, 175 U. S., 175 (44-120), the Court said:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government. * * * The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. * * * The 14th amendment does not profess to secure to all persons in the United States the benefit

> of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its mode of judicial proceedings."
>
> (Mo. v. Lewis, 101 U. S., 22.)

In the case of Maxwell v. Dow, 176 U. S., 593 (44-602), Maxwell was indicted by a grand jury of the territorial government of Utah, but before his trial, Utah had become a State, and adopted a Constitution of its own, and therein made eight, instead of twelve, the number which constituted a legal jury. He was thereafter tried by a jury composed of eight jurors, and this Honorable Court, on a writ of error, reversed the judgment of conviction, because eight jurors did not make a legal jury under the 6th amendment to the Federal Constitution, which was applicable to his case at the time the offense was committed, and in drawing a distinction between the privileges and immunities under a State Government and the privileges and immunities under the Federal Government, this Court said:

> "The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the National Government, and are granted or secured by the Constitution of the United States."

In West v. Louisiana, 194 U. S., 261 (48-969-70), the Court was considering the constitutional right as claimed by plaintiff in error, under the 6th amendment to the Constitution of the United States, to meet the witness

face to face, who testified against him, on the trial of a State offense in a State court, and the Court said:

> "The 6th amendment does not apply to proceedings in State courts. The question as to what is required under its provisions, in order to preserve the right to be confronted with the witness, is eliminated from any inquiry by this Court in this case."

IV.

DISCRETION OF TRIAL COURT.

The challenge of J. C. Alexander was known at common law as a challenge to the favor. When a juror was challenged for favor, his indifference was determined by triers. These triers were appointed by the Court. They tried the first juror and if found competent or indifferent, he was sworn and he and said triers in like manner selected the second juror, who was thereupon sworn, and these two jurors were then constituted the triers to pass on the competency of the remainder of the jury.

There could be no exception to, or review of, the decisions of said triers in the selection of the jury.

Cooley's Blackstone, book, 3 chapter 23, section 3.

By section 212, Criminal Code of Kentucky, the trial court is substituted for the triers of such challenges at common law; and, as at common law, its decisions are not subject to exception or review, under section 281 of the said Criminal Code.

The Court tries the challenges in a summary manner, and in such manner as will enable it to say whether each juror is indifferent as between the accused and the State.

It is the Court, and not the juryman or the accused, who shall say whether or not the proposed juror is free from bias and prejudice.

Section 212, *supra*, has therefore abridged the trial of challenges, by dispensing with the triers at common law and substituted in lieu thereof the judge of the trial court, and the common law practice of determining whether or not the juror was indifferent has been replaced by the methods laid down in our statutes and the Code.

As said in Thompson and Merriam on Juries, section 259:

> "It follows from the general statement of the powers of the Court over the process of impanneling, as found in the previous section, *that the exercise of this power is a matter of discretion.* The circumstances under which this power is ordinarily exercised will be presently noticed. Nevertheless, it by no means follows that, because certain causes have been declared to be sufficient to justify the trial court in excusing a juror, the sufficiency of excuses in general must be considered as a matter of law. *On the contrary, it may be regarded as a generally recognized rule that the discharge of a juror under these circumstances is a matter addressed to the sound discretion of the Court, which will not be reviewed, in the absence of evidence showing prejudice to the complaining party from the abuse of such discretion.*
>
> "As incidental to the power of directing jurors who are unchallenged to withdraw, because in the judgment of the Court they are not qualified to discharge the duties required from jurors, *the Court has authority, either by an examination of the juryman or of any other witnesses to ascertain matters of fact, so as to enable it to exercise this power discreetly.*"
>
> 95 N. C., 611, State v. Green.
>
> 43 Maine, 1-143, State v. Knight.

As said in the case of Snow v. Weeks, 75 Maine, 106:

> *"It was a matter for the exercise of the discretion of the judge. To his ruling upon such a question exceptions do not lie. He may put off a juror when there is no real and substantial cause for it. That can not legally injure an objecting party as long as an unexceptionable jury is finally obtained.* IT IS QUITE A DIFFERENT QUESTION WHERE A JUDGE PUTS A JUROR UPON THE PANEL WHO CAN NOT SIT."

The essentials under the Constitution and laws of Kentucky, like at common law, are that the jury in a felony case shall be composed of twelve men; that they shall be impartial, and that their verdict shall be free and unanimous.

These are the *substantive rights* secured by a trial by jury. The procedure and mode of selecting the jury is not such a right, *unless the right to challenge is equivalent to a right to select.*

Cooley's Constitutional Limitations, 8th Ed., 445-460.

In Hayden v. Commonwealth, 20 R., 274, the trial court discharged two jurors, after they had been sworn on their *voir dire* and in the absence of the accused from the *court room,* and the same question as presented here was involved, and the Court held there was no error, and said:

> *"It appears that after the jurors had been sworn to answer questions, two of them thus sworn were excused by the Court in the absence of the defendant from the court room. This was done without objection of counsel for the appellant, and it does not appear for what cause they were excused. So far as this record shows it may have been done at the instance of the counsel for appellant.*
>
> *"The complaint on this appeal is that the Court*

proceeded to the extent we have indicated without the presence of the defendant. It is true that the defendant should be, and is, entitled to be present at the trial of his case. The presumption must be indulged that the jurors were excused by the Court for cause. *Although the Court might have erred in excusing them, this Court could not reverse on that account. Under these circumstances it necessarily follows that the defendant's momentary absence could not have been prejudicial to his right in a legal sense,* because this Court could not review the action of the Court in excusing the jurors. Besides, the record shows that the appellant's substantial rights were not prejudiced by the action of the Court. The evidence in this case authorized the jury to find defendant guilty of murder."

V.

JURY TRIAL.

A trial by jury according to its meaning in Magna Charta, and at common law, with all its essential incidents, has been had when the accused has been tried by twelve fair, impartial jurymen of the vicinage, whose verdict is free and unanimous, although their selection and the mode of challenge has been different from that at common law.

The challenge made to juror J. C. Alexander, the order, the affidavit of Hackett, and the ruling of the trial court and bill of exceptions on said challenge, ruling and order referred to in the petition for rehearing, disclose no fact which shows that plaintiff in error was not tried by a fair and impartial jury, and this satisfied his constitutional right, Federal and State.

And the record need not show that these privileges or rights were formally tendered to him and formally declined, or that an express waiver was signed. It is enough if it does not appear that they were denied when he applied for them. So there are many other matters which his failure to object to at the time prevents his afterwards complaining of."

VII.

J. C. ALEXANDER, THE JUROR.

The discharge of J. C. Alexander on the challenge of the Commonwealth by the trial court is the ground upon which the plaintiff in error has assigned two errors committed by the trial court, to-wit:

First, because it was error for the trial court, *in the absence of the plaintiff in error, but with his consent*, to ask the juror, Alexander, if he made the statement to said Hackett, to-wit: "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Second, because it was error for the trial court to discharge said Alexander, on the challenge of the Commonwealth, *for good cause*, after he had been tested and accepted by both parties, but before the jury was sworn.

Order, R., 32.

Affidavit of Hackett, R., 32.

Bill of exceptions, R., 33-34.

VIII.

FIRST ERROR.

It will be seen from this record that plaintiff in error was present when Alexander was challenged; that he was present when the affidavit of Hackett was filed; that he was present when said motion was made, and he objected to said motion; that said motion and objection were heard and argued before the Court, in his presence; that the trial court ruled on said motion and challenge and discharged said Alexander in his presence; that he excepted thereto, and that he then made a motion to discharge the panel, which was overruled, and he excepted.

The record does not disclose what took place on this privy examination of Alexander, but inasmuch as it does show that Alexander admitted that he had made the statement, it may be fairly presumed that the Court did ask him the question.

The only reference made to the discharge of the juror, Alexander, by the plaintiff in error, is the second assigned error in his motion and reasons for a new trial (R., 47) and reads:

> "2nd. Because the Court erred in discharging and excusing J. C. Alexander for service herein as a juror, after he had been accepted, and also in overruling the motion then made by defendant herein, to discharge the entire panel, so far as then accepted, to all of which defendant at the time excepted."

It will thus appear from the record that if the trial court asked said Alexander said question in the absence of the plaintiff in error, it was by and with his consent, and without objection or exception then made or taken;

and it further appears that it was not assigned as error in his motion and reasons for a new trial, nor was the attention of the trial court called to it in any manner, nor did said trial court act on same.

The Kentucky Court of Appeals has only appellate jurisdiction to review any error of law which appears on the record, when upon consideration of the whole case the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

Constitution, section 110, Appendix, 6.

Criminal Code, section 340, Appendix, 14.

It follows that, no objection or exception having been made or taken in the trial court as to alleged error of the trial court in asking said question in the absence of plaintiff in error, and no error having been assigned by plaintiff in error in his motion and reasons for a new trial for the same, there was no error appearing on the record for review by the Court of Appeals.

Rutherford v. Commonwealth, 78 Ky., 639.

Kennedy v. Commonwealth, 14 Bush, 340.

Wilkerson v. Commonwealth, 88 Ky., 30.

Merritt v. Commonwealth, 11 R., 17.

Brown v. Commonwealth, 14 Bush, 400.

Ellis v. Commonwealth, 9 R., 824.

Crockett v. Commonwealth, 10 R., 159.

Redmon v. Commonwealth, 82 Ky., 335.

Vinegar v. Commonwealth, 104 Ky., 110.

Branson v. Commonwealth, 92 Ky., 333.

In Rutherford v. Commonwealth, 78 Ky., 639, it was claimed that the Court erred in directing the jury to view

the place of the killing in the absence of the accused, and on this the Court said:

> "It must, however, be borne in mind that in this Court the accused has no constitutional rights. Our power to review the rulings of the lower court in such cases is derived from the statute, and must be exercised within the statute. Whatever our views may be in any particular case, as to whether the accused has had such a trial as is guaranteed to him by the Constitution, *we can not revise the rulings of the trial court unless the authority is conferred by statute.* For constitutional rights the appeal is to the trial court, and not to this Court. The inquiry, then, is, is this such an error as will, under the statute, authorize a reversal?"
>
> 'In felony cases, section 340 of the Criminal Code, which went into effect January 1st, 1877, provides:
>
> "A judgment of conviction shall be reversed for any error of law to the defendant's prejudice, appearing on the record.
>
> "By an act approved March 4th 1880, that section was amended so as to read:
>
> "'A judgment of conviction shall be reversed for any error of law appearing upon the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.'
>
> "If this amendment is ordinarily to have any effect, it must be construed to mean that the power of this Court to reverse in felony cases depends upon two things: *First, that an error appears in the record; second, the Court must be satisfied from consideration of the whole case that the substantial rights of the accused have been prejudiced by the error complained of.*"

In Kennedy v. Commonwealth, 14 Bush, 340, where the complaint was to the summoning of the jury by other

persons than the regular sheriff, and *where appellant failed to object before the rendition of the verdict,* the Court in passing on this question said:

> "*No objection was made before the verdict, on account of the manner in which,* or the persons by whom the jurors were summoned. There is, *we think, enough in the record to show that the person named as special sheriff and his assistants were designated by the Court to summon the jury, and as appellant and his counsel must have known by whom the jury was summoned, and by what authority the parties summoning the jury acted, and failed, until after verdict, to make any objection to the jury on that ground, any irregularity in that respect was waived.* * * * As the appellant *had no right to except* to the order overruling his motion for a new trial, he had no right to have a bill of exceptions, exhibiting anything brought into the record for the first time on that motion, and *as he had no right to have such a bill of exceptions, it constitutes no part of the record, and can not be considered by this Court;* and consequently we can not know that any such error as that complained of was committed.
>
> "*We have no power to look into a bill of exceptions which the legislature has declared should not be allowed, or into a general bill for matters not subject to exception, and then to reverse for an alleged error thus improperly appearing in the transcript.*
>
> "We must reverse for any error of law appearing in the record to the prejudice of the appellant, *but this only applies to such errors as the party had the right to manifest by a bill of exceptions;* and as a bill of exceptions not only not authorized, but expressly prohibited by law, *is no part of the record, an error in respect to any of the matters which under section* 281, *can not be excepted to, is not an error appearing 'in the record' within the meaning of section* 340."

In the case of Wilkerson v. Commonwealth, 88 Ky., 30, wherein appellant was convicted of murder, and on appeal among other errors assigned was:

> "Third. In permitting four of the jurors, after they had been selected as such, but before they were sworn, and during an adjournment of the Court for dinner, to go at large and mingle with the crowd, instead of putting them in charge of an officer."

In passing on this alleged error, the Court said:

> "*No objection was made or exception taken at the time to the action of the Court as to the four jurymen.* The question was first presented on the motion for a new trial. We can not, therefore, consider it."

In the case of Merritt v. Commonwealth, 11 R., 17, no exceptions were taken to any action of the trial court, save in overruling the motion for a new trial, and the Court said:

> "*If a party during the trial of a criminal cause does not take an exception to the ruling of the Court when made, and for the first time presents an objection on account of it in his motion for a new trial, it comes too late to enable him to present the question here for revision.*"

In Brown v. Commonwealth, 14 Bush, 398 (400), it is said:

> "*Objection first made in motion and grounds for new trial as to alleged errors committed during the progress of the trial can not be considered by the Court of Appeals.* * * * Much of the argument of counsel for appellant was directed to the alleged errors of the Court below, in permitting the jury to view the place of killing, without the presence of

> the prisoner and without having the place pointed out to the jury by the Court, or by anyone designated by the Court; *and in permitting the jury to separate during the trial, to receive evidence out of Court and in the absence of appellant. These points as well as several others relied upon in the argument can not be considered by this Court because no objection was made to the action of the Court until the motion for a new trial was made.*"

In the case of Ellis v. Commonwealth, 9 R., 824, it was held:

> "There can be no reversal in a criminal case for an error of the Court in overruling a motion for a new trial, *or because of a matter called to the attention of the Court for the first time by the grounds for a new trial.* Before this case was finally submitted to the jury some one said to one of the jurors, 'Send him up for five years,' and the fact was first called to the attention of the Court by the grounds for a new trial; if this illegal interference with the trial of the case had been called to the attention of the Court at the time, and a motion made to discharge the jury, it would have been a reversible error to overrule it, but the Court can not reverse for the error in overruling the motion for a new trial."

In Crockett v. Commonwealth, 10 R., 159, the Court said:

> "The principal ground relied on for reversal of the judgment of manslaughter in this case is that the jury having up to that time been unable to agree, was influenced to find a verdict of guilty by a statement of the jailer in the presence of one of the jurymen, that the accused preferred a conviction and punishment for a short time in the penitentiary to have the jury disagree. The alleged undue influence upon the jury could have been considered by the lower court only upon motion for a new trial, and as sec-

tion 281, Criminal Code, expressly provides that decisions upon such a motion shall not be subject to exception, this Court is precluded considering it upon this appeal. *Moreover the misconduct of the jury is not, in the meaning of section 340, an error of law for which this Court can reverse a judgment of conviction, but seems, like kindred subjects, to have been intentionally left to the sole judgment of the trial court.*"

In the case of Redmon v. Commonwealth, 82 Ky., 335, one of the grounds relied upon was, that the verdict was reached by lot, and this alleged error was for the first time presented to the Court on a motion for a new trial, and the Court held:

"*From these provisions of the Code the jurisdiction of this Court to try and determine felony cases is derived. The Constitution confers no jurisdiction upon this Court in such cases, but authorizes the Legislature to grant such jurisdiction as it may think proper. We have no more right to depart from or to enlarge the limits of the jurisdiction, as prescribed by the statute, than we would have to assume jurisdiction in case the Legislature had seen fit not to confer any appellate jurisdiction.* The Code, as quoted (section 281) provides that we may consider and reverse in criminal cases where the error appears in the record by bill of exceptions, presented in the manner prescribed, and also provides that the error here complained of (overruling motion for new trial) shall not be subject to exception. We can no more consider an alleged error so presented than we could a case in which there was no bill of exceptions, for in fact a bill of exceptions not authorized is no bill. *We have nothing to do with the policy or impolicy of conferring jurisdiction, in criminal cases, upon this Court, whether limited or unlimited. That belongs to the legislative department. Errors such*

VI.

NO ERROR IN THE DISCHARGE OF ALEXANDER THE JUROR. IT WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT.

Assuming that the trial court did examine Alexander separate and apart from plaintiff in error, it was by his consent and agreement; it was before the trial, under section 183 of the Criminal Code, began, and his presence was not necessary to give the Court jurisdiction to ask said Alexander said question; it was not made a ground by plaintiff in his motion for a new trial, and it not having been made a ground in said motion, and not having been passed upon by the trial court, there was no ruling of the trial court to be reviewed by the Appellate Court, and the Appellate Court being without original jurisdiction to consider said question, this question has never been presented in the highest State court having jurisdiction thereof, and passed on adversely to the plaintiff in error.

Criminal Code, section 202, reads:

> "Section 202. It (challenge) must be taken before he is sworn in chief, unless the Court for good cause permit it to be made at any time before the jury is completed."

Proffat on Jury Trials, section 194, reads:

> "The time when a challenge should be taken to a juror for cause, is when the juror is presented to a party, and before he is sworn. * * * *Nevertheless, a challenge may be allowed in the discretion of the Court, to a juror, after a juror has been sworn and accepted. It is evident that a Court must be invested with the discretion to further the interests*

of justice; for there may often be cases where some serious objection to a juror could not be known until after he was impannelled, or there may be some objection arising from the conduct of the juror subsequent to his being accepted, that should exclude him on the motion of either party. Accordingly, we find such discretion exercised by the Court, without objection. Thus it has been held that, though neither party has a right of challenge after a juror is sworn, it is in the discretion of the Court to protect the administration of justice, by investigating, at any stage of the trial, an objection to the impartiality of a juror, by withdrawing the case from the jury, if any juror is found unfit to sit thereon."

It is shown by the affidavit of Hackett, filed in support of the challenge to said Alexander, that he (Alexander) had had many conversations and arguments with said Hackett about the killing of said Goebel; that much earnest interest and feeling was expressed in these arguments by both Alexander and Hackett, and that said Alexander expressed and urged that there had been no conspiracy among those charged (plaintiff in error being one of them) with the murder of said Goebel. It is also shown by said affidavit, that just after said Alexander had been sworn and examined on his *voir dire,* and admonished by the Court under oath not to converse with any one, or with the other jurors, who had been examined, about the case, and had been placed in charge of the sheriff, he (Alexander) as he went away from the court house, said to Hackett: "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

It is not denied that said Alexander had had said conversations and arguments with affiant, Hackett, or that

the charges against him are untrue; and the record shows that said Alexander admitted that he, in violation of his oath and the admonition of the Court, made the statement to said Hackett. It is not claimed by able counsel for plaintiff in error that Alexander was indifferent between the State and plaintiff in error; or that he was a fair and impartial juror. The Court will note from the record that the challenge was made and argued in the presence of the plaintiff in error, and he was discharged in his presence, but if the Court asked Alexander said question, it was after the challenge had been made and argued. If the Court desired to test the truth of the statement made in the affidavit, he had the right and discretion to do so by interrogating Alexander, and if he had any doubt, it was his duty to protect the administration of justice by so doing.

At the time Alexander was discharged the Commonwealth had exhausted three of its five peremptory challenges, and the plaintiff in error had used twelve of his fifteen. It is not contended by the plaintiff in error that the juror who was called and served instead of Alexander was biased or prejudiced against him, or that he was not indifferent as between the Commonwealth and the plaintiff in error; but he asserts that he had a vested right in the retention of Alexander upon the jury, and by his dismissal he was deprived of a constitutional right. This contention is unsound, as shown elsewhere in this brief.

In State v. Adams, 20 Kan., 689, the Court quoting section 10 of the Bill of Rights and section 207 of the Criminal Code of said State, which are as follows:

> "In all prosecutions the accused shall be allowed to appear and defend in person, or by counsel, to

demand the nature and cause of the accusation against him, to meet the witnesses face to face, and to have compulsory process to compel the attendance of wintesses in his behalf," &c.

And section 207 of the Criminal Code, as follows:

"No person indicted or informed against for a felony can be tried unless he be personally present during the trial," &c.

The Court said by Justice Brewer:

"So far as the provision in the Bill of Rights is concerned, there are two questions: 1st. Is it anything more than the grant of certain privileges, which an accused may waive? and where the record shows no application for the benefit of such privileges, and no refusal of the Court to grant them, and no objection to any action of the Court thereon, is there any error? And, 2nd. Does the sending of a jury to view the place of the alleged crime, in the absence of the accused, trespass on any of its guaranties? *First.* The language is permissive 'The accused shall be allowed;' that is, he may have if he wishes. If he does not wish, he may forego. If he does not wish them, he can not complain that they were not forced upon him. Generally that which is a mere personal privilege, which is not essential to jurisdiction, which is not absolutely and peremptorily required by statute or public policy, may be waived. In the case of State v. Polson, 29 Iowa, 133, the defendant consented that a copy of the testimony given in a former trial might be read as evidence instead of an oral examination of witnesses, and he was held concluded by such consent. His right to meet the witnesses face to face he had waived. So while he is entitled to have counsel, he is not compelled to have them. He has a right to a subpoena for his witnesses, but he is not obliged to have one issued.

Dreyer v. Illinois, 187 U. S., 83.
Jacobi v. Alabama, 187 U. S., 107.
Layhin v. Missouri, 187 U. S., 214.
Tarrance v. Florida, 188 U. S., 573.

In the case of Dreyer v. Illinois, 187 U. S., 79 (47-83), the plaintiff in error had been convicted in the criminal court of Cook county, Illinois, upon a charge of embezzlement, and his punishment fixed at confinement in the State Penitentiary.

In the submission of the case to the jury the Court failed to comply with a law of that State, requiring a constable or other officer to be sworn to attend and keep the jury together while considering the verdict, in conformity with the following provision of the Criminal Code of Illinois:

> "When the jury retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of Court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into Court." * * *

The supreme court of that State had held in a number of cases in construing the section of the Code above quoted, that such failure on the part of the Court to swear the constable or other officer, when the case was submitted to the jury, was reversible error.

In that case, the bailiffs in charge of the jury, filed their affidavits setting up the fact that the required oath

had been administered to them upon the beginning of the trial, but the case was not given to the jury till six days thereafter, and that said oath was held not sufficient, but the plaintiff in error in that case, *as in the case at bar, failed to make any objection or save any exception to the officers taking charge of the jury,* without first taking the oath.

His conviction having been affirmed by the supreme court of Illinois, he upon writ of error prosecuted an appeal to this Court.

Justice Harlan in delivering the opinion of the Court, said:

> "It was, however, held that under the principles established by former decisions in Illinois, the requirements of the statute could be waived by the accused, and *that his failure to object at the time, that the officer having charge of the jury was not sworn* when the jury retired, *was equivalent to a waiver of compliance with its provisions.* And it was adjudged 'that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable or other officer, sworn to attend it, as prescribed by statute, is not properly raised by the record (of this case), and therefore (is) not available as error in this Court.'
>
> "It thus appears that while the State court expressly recognized the rights of the accused under the statute, *it adjudged that he had not properly raised on the record the question, raised for the first time on motion for new trial, as to noncompliance with its provisions.* But, manifestly, this decision presents no question of a Federal nature. A ruling to the effect that the accused shall be deemed to have waived compliance with the statute if the *record does not show that he objected at the time to the action of the Court, was an adjudication simply of a question of criminal practice and local law, was not*

in derogation of the substantial right recognized by the statute, and did not impair the constitutional guaranty that no State shall deprive any person of liberty without due process of law. We can not perceive that such a decision by the highest court of the State brings the case upon this point within the 14th amendment, even if it should be assumed that the due process of law prescribed by that amendment required that a jury in a felony case should be placed in charge of an officer especially sworn at the time to attend and keep them together until they returned their verdict or were discharged.

"*We adjudge that in holding that the record did not sufficiently present for consideration the question now raised, the State court, even if it erred in its decision, did not infringe any right secured to the defendant by the Constitution of the United States.*"

XI.

WHEN THE CHALLENGE TO A JUROR HAS BEEN ALLOWED AND AN IMPARTIAL JUROR SUBSTITUTED IN HIS PLACE, THE CONSTITUTIONAL RIGHT OF THE ACCUSED TO A FAIR AND IMPARTIAL JURY HAS NOT BEEN IMPAIRED.

At the time Alexander was discharged the Commonwealth had exhausted three of its five peremptory challenges, and the plaintiff in error had used twelve of his fifteen. It is not contended by the plaintiff in error that the juror who was called and served instead of Alexander was biased or prejudiced against him or that he was not indifferent as between the Commonwealth and the plaintiff in error; but he asserts that he had a vested right in the retention of Alexander upon the jury, and by his

dismissal he was deprived of a constitutional right. This contention is unsound, as will be seen from the following authorities:

Thompson & Merriam on Juries, page 268, section 251.
Reynolds v. U. S., 98 U. S., 247.
U. S. v. Morris, 26 Fed. Cases, No. 15,815.
Hopt v. Utah, 120 U. S., 430 (30-708).
Hays v. Missouri, 120 U. S., 71 (30-580).
Ex parte Spies, 123 U. S., 131 (31-81).

Thompson & Merriam on Juries, section 251, reads:

> "Where a statute simply provides that an exception may be taken to the decision of the trial court in *disallowing* a challenge, no exception lies to the action of the Court in *allowing* a challenge. The reason is that when a *competent jury, composed of the requisite number of persons, has been impannelled and sworn in the case, the purpose of the law has been accomplished. Neither party can be said to have a vested interest in any juror; therefore, although in impannelling a jury one competent person has been rejected, yet if another equally competent has been substituted in his stead, no injury has been done.*
>
> "By the Criminal Code of Kentucky all challenges are tried by the Court, and its decision in no case is subject to exception."

In Reynolds v. United States, 98 U. S., 168 (25-247), the Court in passing on a similar question said:

> "It needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause, it was for favor. A judgment will not be reversed simply because a challenge,

good for favor, was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside."

In U. S. v. Morris, 26 Fed. Cases, No. 15,815, the Court said:

> "Suppose a prisoner on trial for his life should inform the Court that a juror had been bribed to convict him—that the fact was unknown to him when the juror was sworn and that he had just obtained plenary evidence of it, which he was ready to lay before the Court—is the Court compelled to go on with the trial? Suppose the judge, during the trial, obtains by accident personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence, is he bound to hold his peace? In my judgment such a decision would be as wide of the common law as it would be of common sense and common honesty."

In the case above each juror had answered on his *voir dire* that he had no opinion or bias. After the jury was sworn and the witnesses examined for the prosecution, the attorney for the Government challenged one of the jurors for bias; the defendant objected, but, after hearing the proof, the Court sustained the challenge and discharged the jury, and it was held to be no bar.

Dilworth v. Commonwealth, 12 Gratt., 689.

In Hopt v. Utah, 120 U. S., 430 (30-708), the Court said:

> "When a challenge by a defendant in a criminal action to a juror for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant and excused, and an impartial and competent juror is obtained in his place,

no injury is done the defendant, if until the jury is completed he has other peremptory challenges which he can use."

In Hayes v. Missouri, 120 U. S., 71 (30-580), the Court in substance said:

> *"The right to challenge is the right to reject, not to select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained."*

In Ex parte Spies, 123 U. S., 131 (31-85), this Court said:

> "On an application to this Court for a writ of error to a State court, *on the ground that a statute of a State as construed by the State court, deprived the petitioner of a trial by an impartial jury, this Court will only consider rulings on the challenges to the jurors who actually sat at the trial. When a challenge to a juror for bias is disallowed and the juror is peremptorily challenged and excused, and an impartial juror is obtained in his place, the constitutional right of the accused is maintained."*

XII.

HOPT v. UTAH.

This case (Hopt v. Utah, 110 U. S., 263) is relied on by plaintiff in error, and we desire to draw the distinctions between it and the case at bar.

1.

The Hopt case was under an indictment in the United States Court for the Territory of Utah. Hopt challenged six jurors for cause.

In the case here, the Commonwealth of Kentucky challenged Alexander for cause.

2.

The district attorney objected to the challenge in the Hopt case.

The plaintiff in error objected to the challenge in the case at bar.

3.

Under the Code of Utah triers were appointed in the Hopt case to try and determine the challenges under instruction of the Court.

In the case at bar, under the Code of Kentucky, the Court hears and determines the challenges in a summary manner.

4.

In the Hopt case the triers took the jurors challenged from the court room; *out of the presence of both the Court and the defendant and his counsel*, and there tried the grounds of challenge, and overruled said grounds. There was no agreement as to this procedure, nor was there an objection or exception.

In the case at bar the Court heard the challenge of the Commonwealth and the argument of counsel on same, in the presence of the plaintiff in error; but before discharging Alexander, *by agreement between counsel*, the trial court asked Alexander as to the truth of the statement in the affidavit. The challenge was sustained, and Alexander was discharged over objection of plaintiff in error.

5.

In the Hopt case, after exhausting his peremptory chal-

lenges, defendant was compelled to accept one of the six jurors he had challenged.

In the case at bar Alexander was discharged, without the Commonwealth being required to peremptorily challenge him.

6.

In the Hopt case, which was tried in the United States Court, in the Territory of Utah, it was held that the trial began with the selection and work of empanneling the jury, and that the presence of the accused could not be dispensed with.

In the case at bar, as we show by citations of opinions of the Kentucky Court of Appeals, construing sections 11 of the State Constitution and 183 of the Criminal Code, the rule is well settled that the trial begins when a jury has been selected, sworn and charged with the deliverance of the accused, and even occasional absence thereafter is no grounds for reversal, unless it appears from the whole record, that the substantial rights of the accused were prejudiced thereby, and the construction of section 11 of the State Constitution and section 183 of the Criminal Code, by the Kentucky Court of Appeals, as to the right of the accused to be present and meet the witnesses face to face, only refers to his rights after the accused has been arraigned, entered his plea, and the jury is sworn and charged with his deliverance.

7.

The Hopt case having been brought to this Court on a writ of error to the United States territorial court, the jurisdiction of this Honorable Court extended to any

as that complained of here were left to the discretion of the lower or trial court, where the whole jurisdiction might have been left, if the Legislature should have thought proper."

In the case of Vinegar v. Commonwealth, 104 Ky., 114, the Court, after quoting fully what we have quoted above from the Redmon case, and other cases cited above, used the following language:

"After careful consideration by the entire Court, we think that the argument of this opinion, which has been followed in numerous cases, construing section 281, *Criminal Code, is unanswerable."*

In the case of Branson v Commonwealth, 92 Ky., 333, in passing on the question of proper time for objecting and excepting, the Court said:

"Where the step is proposed to be taken by the other party it should be objected to, in order to specially call the Court's attention to it; and if its ruling be adverse to the objecting party, then he must except. This is the proper practice. It is the express rule of the present Civil Code, and a proper conduct of criminal cases requires, in our opinion, the same practice. The provisions of the Criminal Code admit, and it seems to us require, such a construction. The trial judge should be made aware when one side proposes to take a certain step in a case that it is objected to upon the other side. This is fair to him. The matter is likely then to receive more careful attention from him. *The party ought not to wait, as if he were consenting, and then afterward merely except to what has been done. He should also except to the decision when made, else it can fairly be inferred that, although he objected when the step was proposed by the adverse party,*

yet that he has acquiesced in the Court's decision as correct."

IX.

Hence the conviction of the plaintiff in error was due process of law; and this question having been neither presented to the trial court, nor passed on adversely to him by it, it was not before the Kentucky Court of Appeals for review, and it being without jurisdiction to consider said question, there is no ruling of the trial court or the Kentucky Court of Appeals, as appears from the record, which presents to this Court any question of a Federal nature.

Dreyer v. Illinois, 187 U. S., 83.
Jacobi v. Alabama, 187 U. S., 107.
Brooks v. Missouri, 124 U. S., 456.
Baldwin v. Kansas, 129 U. S., 641.

In Jacobi v. Alabama, 187 U. S., 107 (47-107), wherein was raised the question of the constitutional right to meet the witnesses against him face to face; and in considering same, made a distinction between a writ of error from the highest court of a State, and from the supreme court of a Territory. The Court held:

> "A writ of error to review the judgment of the highest tribunal of a State stands on a far different ground from a direct appeal from the supreme court of a Territory, and can not be maintained in the absence of a Federal question giving jurisdiction. * * * In Spies v. Illinois, 123 U. S., 131, * * * Mr. Chief Justice Waite said: 'To give us jurisdiction under section 709 of the Revised Statutes, because of the denial by a state Court of any title, right, privilege or immunity claimed under the Con-

stitution, or any treaty or statute of the United States, *it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time in the proper way. To be reviewable here, the decision must be against the right to so set up or claimed. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that Court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more.*

"This is not, as it seems to be supposed by one of the counsel for petitioners, *a question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right to review here is concerned.*"

In Howard v. State of North Carolina, 191 U. S., 126 (48-122), the Court said:

"We premise that the trial was had in a *State court and therefore our range of inquiry* is not so broad as it would be if it had been in *one of the Courts of the United States.*. The highest court of the State has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial. * * * It does not appear that the *Federal character of the question was presented to the supreme court of the State, although in the opinions of the supreme court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to hold that we have no jurisdiction*

in the case coming from the supreme court of the State, and the writ of error will be dismissed."

In Brooks v. Missouri, 124 U. S., 394 (31-456), the Court said:

> "In Spies v. Illinois, 123 U. S., 131, it was said that, 'to give us jurisdiction under section 709 of the Revised Statutes because of a denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such right, title, privilege or immunity was specially set up or claimed, at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that Court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more.'
>
> *"Applying that rule to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the Constitution, laws or treaties of the United States.* * * * Others of the exceptions taken at the trial relate to rulings by means of which it is claimed the defendant was deprived of an impartial jury, but it does not appear to have been claimed that any provisions of the Constitution of the United States guaranteed to him such a jury. *That the sixth article of the amendments contain no such guaranty as to trials in State courts has always been held."*

In Baldwin v. Kansas, 129 U. S., 57 (32-641), this Court re-affirmed the decision in Spies v. Illinois, using the indentical language quoted in the case of Brooks v. Missouri, *supra*, and said:

"A still more conclusive answer on this point is that no objection was made to the form of the oath when it was administered or at any other time prior to its presentation in this Court. If there was any irregularity in this respect, it should, and probably would have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of oath so well understood, and which is in universal use in all the courts of the State; *but if the form of the oath was defective, the attention of the Court should have been called to it at the time the oath was taken, so that it might have been corrected. A party can not sit silently by and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath. Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated in the bill of exceptions, in order that this Court may see whether or not it is sufficient. This was not done.*

"This statement of the condition of the record shows that no Federal question is presented, in regard to the oath administered to the jurors, of which this Court can take jurisdiction. Section 709 of the Revised Statutes provides that a final judgment in any suit in the highest court of a State, in which a decision in the suit could be had, where any title, right, privilege or immunity is claimed under the Constitution, and the decision is against the title, right, privilege or immunity 'specially set up or claimed' by either party, under such Constitution, may be re-examined and reversed or affirmed, in the supreme court, upon a writ of error. *In the present case, the record does not show that, at the trial before the jury, any title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed.* No objection was taken to the form of the oath at the trial, nor at the making of the motion for a new trial before the trial court, nor at

the making of the motion for arrest of judgment in that Court. *The point was first suggested in the supreme court of the State. That Court, it appears, refused to consider the objection, on the ground that it was not taken at the trial. For that reason we also can not consider it.*"

Citing Spies v. Illinois, 129 U. S., 131.

X.

ASSUMING THAT THE TRIAL COURT ASKED THE JUROR, ALEXANDER, THE QUESTION HE IS SAID TO HAVE ASKED HIM, IN THE ABSENCE OF THE PLAINTIFF IN ERROR, *THE RECORD PRESENTS NO FEDERAL QUESTION.*

IT WAS BY AGREEMENT AND NO OBJECTION OR EXCEPTION TAKEN THERETO. THIS QUESTION WAS NOT EVEN PRESENTED TO THE TRIAL COURT ON MOTION FOR A NEW TRIAL.

THE KENTUCKY COURT OF APPEALS BEING A COURT OF REVIEW, HAD NO ORIGINAL JURISDICTION TO PASS ON SAID QUESTION IN THE ABSENCE OF AN OBJECTION AND EXCEPTION IN THE TRIAL COURT.

BEFORE THIS COURT WILL REVIEW ANY FEDERAL QUESTION, THE PLAINTIFF IN ERROR MUST HAVE PRESENTED IT IN THE HIGHEST STATE COURT, AND IT MUST HAVE BEEN DECIDED THERE, ADVERSELY TO HIM. UNDER SECTION 281 OF THE CRIMINAL CODE THE TRIAL COURT IS NOT ONLY THE HIGHEST COURT, BUT THE ONLY COURT THAT COULD PASS ON SAID QUESTION.

"The inquiry, then, is, is this such an error as will, under the statute, authorize a reversal?

"In felony cases, section 340 of the Criminal Code, which went into effect January 1st, 1877, provides:

"A judgment of conviction shall be reversed for any error of law to the defendant's prejudice, appearing on the record.

"By an act approved March 4th, 1880, that section was amended so as to read: 'A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.'

"If this amendment is ordinarily to have any effect, it must be construed to mean that the power of this Court to reverse in felony cases depends upon two things: *First.* That an error appear on the record. *Second.* The Court must be satisfied from consideration of the whole case that the substantial rights of the accused have been prejudiced by the error complained of."

XV.

JURISDICTION—COURT OF APPEALS.

Constitution of Kentucky, section 110, reads:

"Section 110. *Jurisdiction and Powers of—The Court of Appeals* SHALL HAVE APPELLATE JURISDICTION ONLY, *which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law.* Said Court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

Sections 280, 281 and 340 of the Criminal Code read:

"Section 280. *Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.*

"Section 281. *The decisions of the Court* upon *challenges to the panel,* and *for cause,* upon *motions to set aside an indictment,* and *upon motions for a new trial, shall not* BE SUBJECT TO EXCEPTION.

"Section 340. *A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.*"

In Kennedy v. Commonwealth, 14 Bush, 344, the Court in construing above sections, used the following language:

"As the appellant had no right to except to the order overruling his motion for a new trial, he had no right to have a bill of exceptions, exhibiting anything brought into the record for the first time on that motion, and as he had no right to have such a bill of exceptions, it constitutes no part of the record, and can not be considered by this Court; and consequently we can not know that any such error as that complained of was committed. We have no power to look into a bill of exceptions which the Legislature has declared should not be allowed, or into a general bill for matters not the subject of exception, and then to reverse for an alleged error thus improperly appearing in the transcript.

"We must reverse for any error of law appearing in *the record* to the prejudice of the appellant, *but this only applies to such errors as the party had a right to manifest by bill of exceptions; and as a bill of exceptions, not only not authorized, but expressly prohibited by law, is no part of the record, an error in respect to any of the matters under section*

281, *can not be excepted to is not an error appearing 'in the record' within the meaning of section* 340."

In Morgan v. Commonwealth, 14 Bush, 114, the Court said:

"It is also objected by appellant that the Court refused to sustain his challenge for cause to Green and Million, two of the jurors by whom he was convicted. It is useless to discuss the question as to whether the causes of challenge should have been sustained, for by section 281 of the Criminal Code, 'the decision of the Court upon challenges to the panel, and for cause, shall not be subject to exception.'"

In Terrell v. Commonwealth, 13 Bush, 250, the Court said:

"Section 340 of the Code provides: 'A judgment of conviction shall be reversed for any error of law, to the defendant's prejudice, appearing in the record.'

"Sections 280 and 281 read:

"Section 280. Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions of the next section.

"Section 281. The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motion for new trials, shall not be subject to exception.

"Construing these sections, 340 and 280 and 281, together, *it seems to us clear that we have no power under the present Code to reverse the appeal of either party for error in decision upon challenges to the panel, or for cause, or upon motions to set aside an indictment, or for a new trial.*"

In York v. Commonwealth, 82 Ky., 362, in construing these sections the Court said:

> "If it be true that the trial jury were not properly selected by their names not being drawn from the regular panel, * * * yet he can not rely upon these facts for a reversal in this Court, because, even admitting that they would constitute reversible errors if properly presented; *yet the record discloses the fact that he made no complaint upon this score until the motion for a new trial was made, and that he then, for the first time, excepted to such action; and a decision of the lower court upon a motion for a new trial is not subject to exception.*"

Hence it will be clearly seen from decision, *supra*, that the Court of Appeals of Kentucky has no jurisdiction to review a decision of the trial court on a challenge to a juror for cause, and the discharge of the juror, Alexander, upon a challenge for cause by the Commonwealth was final, and was subject to neither exception, nor review by the Appellate Court. It would have been, not the erroneous exercise of a power, but the usurpation of a power withheld from said Court, under the law if the Court of Appeals had reviewed the decision of the lower court.

XVI.

RECORD MUST SHOW OBJECTION AND EXCEPTION.

In order to give the Appellate Court jurisdiction, under the laws of Kentucky, there must be an objection and exception to the decision of the trial court at the time

said decision is made, and the substantial rights of the accused must be prejudiced thereby.

CRIMINAL CODE.

"Section 280. Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.

"*Section* 281. *The decisions of the Court* upon *challenges to the panel,* and *for cause,* upon *motions to set aside indictment, and upon motions for a new trial, shall not be subject to exceptions.*

"Section 282. *The exceptions shall be shown upon the record, by a bill of exceptions, prepared, settled* and signed as provided in Code of Practice in civil cases."

CIVIL CODE.

"Section 333. 1. An *exception* is an *objection taken to* a decision of the Court upon a matter of law.

"2. A party may, without a previous objection, except to a decision against him, unless it be made at the instance of the adverse party.

"3. But a party can not except to a decision made at the instance of the adverse party unless objection shall have been made to the motion, offer or request of the adverse party.

"Section 334. *The party objecting must except when the decision is made;* and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the Court."

Branson v. Commonwealth, 92 Ky., 330.
Loving v. Warren Co., 14 Bush, 316.
Cook v. Commonwealth, 13 R., 702.
Brooks v. Commonwealth, 12 R., 403.

In Branson v. Commonwealth, 92 Ky., 330, the Court said:

> "Where the step is proposed to be taken by the other party it should *be objected to,* in order to specially call the Court's *attention to it; and if its ruling be adverse to the objecting party, he must except.* This is the proper practice. *It is the express rule of the present Civil Code, and a proper conduct of criminal cases requires, in our opinion, the same practice. The provisions of the Criminal Code admit, and it seems to us require, such a construction.* The trial judge should be made aware when one side proposes to take a certain step in a case that it is objected to upon the other side. *This is fair to him.* The matter is likely then to receive more careful attention from him. *The party ought not to wait, as if he were consenting, and then afterward merely except to what was done. He should also except when the decision is made, else it can be fairly inferred that, although objecting when the step was proposed by the adverse party, yet that he has acquiesced in the Court's decision as correct."*

In Loving, &c. v. Warren County, 14 Bush. 320, the Court said:

> *"That an objection must be made to an instruction given on the motion of the adversary as well as an exception, so as to make the error complained of a ground for reversal in this Court, is as much required by this provision of the Code as any other offer, motion or request."*

In Cook v. Commonwealth, 13 R., 702, the Court held:

> "In the absence of a bill of exceptions the action of the Court in the conduct of the trial will be presumed to have been correct, and the evidence sufficient to support the verdict."

In Brooks v. Commonwealth, 12 R., 403, the Court said:

> "The decision of the trial court upon a motion for a new trial is not subject to exception, and can not therefore constitute ground for a reversal by this Court.
>
> "The other ground of complaint is, that the State was allowed to introduce, as a witness against him, one jointly indicted with him without first entering a *nolle prosequi* as to the witness. It is evident, however, that the bill of exceptions does not contain all the testimony introduced upon the trial, or show all that then occurred. In the absence of a bill showing all the evidence, the second point urged can not be considered."

So, if the trial judge did ask juror Alexander said question in the absence of the plaintiff in error, *there was not only no objection to the trial judge asking him whether or not he said to Hackett,* "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," but it was done without objection or exception by the plaintiff in error, and there was nothing, so far as the trial court asking Alexander the question, before the Appellate Court for review, and it was, under the law, without jurisdiction to review or consider the alleged error.

XVII.

JURISDICTION OF THE TRIAL COURT.

The trial (circuit) court being the highest Court in the State of Kentucky having jurisdiction to decide upon a challenge to a juror for cause, and its decision being final, and same not being subject to review by the Ap-

pellate Court, and no objection or exception having been made or taken to the action of the trial judge in asking the juror Alexander whether or not he said to Ben Hackett, "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," and the Court of Appeals of Kentucky, being without jurisdiction either to hear or review said matter, it follows, that if the plaintiff in error has been denied any Federal right—which we deny—he has never presented it to the highest and only Court in the Commonwealth having jurisdiction to hear and decide it, and such alleged right has not been decided adversely to plaintiff in error by any Court whatever.

This Honorable Court will not undertake to confer jurisdiction on the Kentucky Court of Appeals to consider said question, nor to regulate or prescribe the jurisdiction of the several courts of that Commonwealth. This question not having been presented in the State court having jurisdiction of the question, and hence not decided against plaintiff in error, it follows, in view of the following decisions of this Honorable Court that there is no question here for review by this Honorable Court.

The writ of error from this Honorable Court is to the Kentucky Court of Appeals; and in so far as the errors assigned refer to the juror, Alexander, it is to review a question which said Kentucky Court of Appeals had no jurisdiction to review, and under the laws of Kentucky it was prohibited so to do.

The alleged constitutional right had not been set up or claimed in the trial court, and its attention not having been called to it, it had not ruled thereon, and there was

error appearing on the record, whereby the substantial rights of Hopt were prejudiced.

The case at bar has been brought here on writ of error to the State court of Kentucky; this Honorable Court's jurisdiction only extends to such Federal questions as appear from said record, whereby the rights of the plaintiff in error have been prejudiced.

XIII.

THE RECORD SHOWS THAT APPELLANT WAS PRESENT DURING TRIAL OF CHALLENGE.

J. C. Alexander, the juror, was challenged in the presence of the appellant in error; the affidavit of B. F. Hackett was filed in the presence of plaintiff in error; the motion to discharge Alexander was made in his presence; plaintiff in error objected to said motion to discharge Alexander; said motion and the objection were argued by counsel in his presence; Alexander was discharged by the Court in the plaintiff's presence, to which ruling of the Court he then excepted, and moved the Court to discharge the entire panel.

The bill of exceptions (R., 34) states:

> "That on said motion to discharge said Alexander and before he was discharged, by agreement with counsel upon either side, the Court *privately* examined said Alexander as to the truth of the *charges* as to what he said to said Hackett, while he, Alexander, was in custody of the sheriff."

The order (R., 32) states that:

> "It was agreed by counsel on either side that the

> Court might, in the absence of the defendant and counsel, question said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to Hackett while in custody of the sheriff, 'Hello, Ben,' &c." * * *

The record shows that the Court did examine said Alexander, but fails to show what took place on said privy examination; that said Alexander admitted he made the statement, but claimed he did it in a jocular way. It may be presumed that Alexander was addressing the Court, where the record states: "The said Alexander having admitted the truth of said statement, but claims that said statement was made in a jocular way."

Order, R., 32.

Affidvit of Ben Hackett, R., 32.

Bill of exceptions, R., 33-34 and 35.

But the record does not show and it can not be presumed that the trial court heard any evidence on the trial of said challenge, in the absence of plaintiff in error.

It is stated by counsel for plaintiff in error (brief, 101 and 104) that plaintiff, Howard, "was in custody—prison"—when the challenge to Alexander for cause was made and decided by the Court, when in fact the record shows that he was present.

By the opinion of the Kentucky Court of Appeals herein, and the decisions cited in said opinion, and referred to elsewhere in this brief, the rule requiring the defendant in a felony case to be present during the trial has never been rigidly enforced in this State, and the rigid enforcement of section 183 of the Criminal Code has been relaxed and not enforced unless it is shown by

the record that by reason of his absence his substantial rights had been prejudiced.

It clearly appears from the record herein that the plaintiff in error was not only present during the trial of said challenge, but that his substantial rights were not prejudiced by the discharge of Alexander; and that his constitutional right was secured to him in the substitution of an impartial juror instead of Alexander.

XIV.

THE RIGHT OF APPEAL IS NEITHER A CONSTITUTIONAL RIGHT NOR A RIGHT UNDER THE COMMON LAW.

Cooley's Blackstone, 3rd edition, volume 4, page 391.

Revised Statutes (Ky.), chapter 27, article 1, section 1 (1852).

Criminal Code of Practice (1854), 274-275-326 and 333.

Montee v. Commonwealth, 3 J. J. Mar., 132.

Commonwealth v. Mitchell, 3 J. J. Mar., 630 (decided in 1830).

Commonwealth v. Craig, 15 B. M., 536.

Cornelius v. Commonwealth, 15 B. Mon., 545.

Conley v. Commonwealth, 17 B. Mon., 409.

Rutherford v. Commonwealth, 78 Ky., 639.

No right of appeal existed at common law, in cases of conviction of an accused charged with a felony. No right of appeal from a conviction in a State court for a State offense is guaranteed the accused by the Federal Constitution, or any law of the United States. No right of appeal is guaranteed the accused from conviction in the

State courts for a State offense, by the Constitution of Kentucky. On a conviction of an accused in the State courts of Kentucky he has a statutory right to have the rulings and decisions of the State court, on specific questions, reviewed by the Appellate Court.

In the case of Montee v. Commonwealth, 3 J. J. Mar., 132, and likewise in the case of Mitchell v. Commonwealth, 3 J. J. Mar., 630, both decided in the Kentucky Court of Appeals in the year 1830, *it was held that a writ of error to the Court of Appeals in a felony case should be dismissed, as that Court had no jurisdiction to review the proceedings, or reverse the judgment of inferior courts for any cause or alleged error.* Revised Statutes chapter 27, article 1, section 1 (1852), in defining the jurisdiction of the Court of Appeals of Kentucky, said:

> "The Court of Appeals shall have jurisdiction, by appeal or writ of error, in matters of law, from the final order, judgment or decree of any inferior court, *except as otherwise provided in this chapter.*
>
> "1. *No writ of error or appeal shall lie in cases of felony.*" * * *

This law was amended by the Criminal Code of March 9th, 1854, and the jurisdiction of the Court of Appeals enlarged and extended by the following sections thereof, to-wit:

> "Section 274. Upon the *trial of Criminal* or penal prosecutions *either party may except to any decision of the Court by which the substantial rights of such party are prejudiced,* SUBJECT TO THE RESTRICTIONS IN THE NEXT SECTION.
>
> "Section 275. The *decisions of the Court upon challenges to the panel, and for cause, upon motions*

to set aside an indictment and upon motions for a new trial, shall not be subject to review.

"Section 326. *The Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article.*

"Section 333. A judgment of conviction shall only be reversed for the following errors of law to the defendant's prejudice appearing on the record:

"1. An error of the circuit court in admitting or rejecting important evidence.

"2. An error in instructing or in refusing to instruct the jury.

"3. An error in failing to arrest the judgment.

"4. An error in allowing or disallowing a peremptory challenge."

Commonwealth v. Craig, 15 B. Mon., 536 seems to have been the first case coming to the Court of Appeals for a construction of the part of the Criminal Code of 1854, referred to above, and giving it the proper construction the Court said:

"At the time the judgment was rendered, according to the then existing law, no appeal was allowed in cases of felony, but the judgment of the circuit court in such cases was final and irreversible."

In the case of Cornelius v. Commonwealth, 15 B. Mon., 545, the Court in defining the powers of the Kentucky Court of Appeals, said:

"The appellant was indicted for murder and found guilty. *A judgment of conviction can only be reversed for the following errors of law to the defendant's prejudice appearing on the record:*

"1. An error in the circuit court in admitting or rejecting important testimony.

"2. An error in instructing or refusing to instruct the jury.

"3. An error in failing to arrest the judgment.

"4. An error in allowing or disallowing a peremptory challenge.

"(1). *No objection to any of the proceedings in the circuit court, which does not come under one of the foregoing heads, can be relied upon in this Court, or made available for the reversal of a judgment of conviction. Consequently the action of the circuit court in overruling the motion for a new trial, so far as the motion was based upon the alleged fact that one of the jurors had expressed an opinion adverse to the prisoner previous to the trial, of which he and his counsel were uninformed until the trial was concluded, is not a proper subject of inquiry on this appeal.*"

In the case of Conley v. Commonwealth, 17 B. Mon., 409, it was held that the jurisdiction of the Court of Appeals to review a judgment of a lower court in felony cases, was limited to the review of the errors enumerated in the Criminal Code; and all other rulings of the Court were not proper subjects of review on an appeal to the Court of Appeals.

In Rutherford v. Commonwealth, 78 Ky., 639, the Court said:

"It must, however, *be borne in mind that in this Court the accused has no constitutional rights. Our power to review the rulings of the lower court in such cases is derived from the statute, and must be exercised within the statute.* Whatever our views may be in any particular case, as to whether the accused has had such a trial as is guaranteed to him by the Constitution, *we can not revise the rulings of the trial court unless the authority is conferred by the statute. For constitutional rights the appeal is to the trial court.*

for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

Section 183 of the Criminal Code reads:

"If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial; *unless his bail appear personally in Court*, and *consent* that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. *If he escape from custody after the trial has commenced, the trial may either be stopped or progress to a verdict, at the discretion of the Commonwealth's attorney;* but judgment shall not be rendered until the presence of the defendant is obtained."

Collier v. Commonwealth, 110 Ky., 518.
Meece v. Commonwealth, 78 Ky., 586.
Willis v. Commonwealth, 85 Ky., 68.
Allen v. Commonwealth, 86 Ky., 645.
Yarbrough v. Commonwealth, 89 Ky., 155.
Hite v. Commonwealth, 14 R., 309.
Williams v. Commonwealth, 78 Ky., 96.

In Collier v. Commonwealth, 110 Ky., 518, the Court in construing section 183 of the Criminal Code, and section 11 of the Constitution, by Judge O'Rear, said:

"1. The Constitution and laws of this State *guaranty* to any person accused of crime the right to a public trial, and the right to be confronted by the witnesses appearing against him. (Section 11, Constitution; section 183, Criminal Code Practice.) This means that no man can be deprived of his liberty by judgment of a Court unless by a public trial, and unless the witnesses accusing him appeared in person at the trial, at which he could and should also be present. This much the laws of the land guaranty to him, but *they do not go further to allow him to voluntarily and unlawfully absent himself from the trial after it has regularly and legally*

begun, and *then for such absence allow the claim that his constitutional privileges have been ignored or abridged by the Court.* If he has suffered *the lack of enjoyment of the constitutional right of being confronted by his witnesses, it is because he himself refused to be confronted. There was neither failure of due provision of legal opportunity nor of fair privilege afforded by the Court for the defendant to meet his accusers face to face at the trial.* Every step required by a regardful observance of these ancient and invaluable guaranties of fair trials was duly and fairly taken by the Court's officers. *The accused, by personally, voluntarily and unlawfully abandoning the trial, deprived himself of whatever value the privilege of personal presence would have been to him.* THE TRIAL HAVING BEEN BEGUN WHEN THE JURY WAS SWORN (Williams v. Commonwealth, 78 Ky., 93; Gaskins v. Commonwealth, 97 Ky., 30 S. W., 1017; Huff v. Commonwealth, Ky., 42 S. W., 907, 19 Ky., L. R., 1064), the Commonwealth's attorney doubtless construed that to withdraw the juror without the defendant's consent would operate as a bar to another trial for the same offense, the defendant having been once in jeopardy. It was by statute clearly within his discretion, at least, whether the trial should proceed to a verdict." * * *

In Meece v. Commonwealth, 78 Ky., 586, one of the contentions of appellant was, that after the case had been submitted to the jury, they returned into Court, *and asked and received further instructions, during all which time appellant was kept in jail, and not permitted to be present in Court,* and in passing on this the Court said:

"The jury after retiring came into Court and asked for further instructions. *The Court declined to give any, but, in the presence of the counsel for the prisoner, inserted in the last instruction noticed, the words,* 'IN ARRIVING AT A CONCLUSION ON THIS POINT, THE JURY MUST TAKE INTO CONSIDERATION ALL THE FACTS AND CIRCUMSTANCES PROVEN IN THE CASE.'

"The *accused was absent at the time,* and it is urged that for this reason the judgment should be re-

versed. While we recognize the fact that the accused, when on trial for a criminal offense, should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence, either before or after the submission of the cause to the jury, *still this Court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the Court below,* and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, THE RIGHT OF APPEAL FROM THE VERDICT AND JUDGMENT AGAINST HIM DOES NOT EXIST, *except by reason of the legislation of the State on the subject, and when permitting an appeal, the law-making power has the right to determine for what cause a reversal may be had.*"

In Willis v. Commonwealth, 85 Ky., 68, *where one of the errors set out was the Court's ruling that as a jury had not been sworn, the trial had not begun, on which the Court of Appeals said:*

> "*The decisive inquiry then is, when does the trial of an indictment for felony, in the meaning of section* 229 *begin? It seems to us, it can not, with propriety* or accuracy, be said to *begin until the issue is formed and the jury sworn to try it.* For, as has been held by this Court, the defendant can not be regarded as being in jeopardy of his life or liberty until then. EVERYTHING DONE PREVIOUSLY IS MERELY PRELIMINARY TO THE TRIAL."

In Allen v. Commonwealth, 86 Ky., 642, the Court said in construing section 183 of the Criminal Code:

> "The Criminal Code, by section 183, provides that the defendant must be present '*during* the trial' of a felony. This is but declaratory of the common law. *The trial begins with the swearing of the jury, and ends when the verdict is rendered.*"

In Yarbrough v. Commonwealth, 89 Ky., 155, as to the presence of the accused when the jury was discharged after failing to agree, the Court said:

> "We fail to see why the accused is to be regarded as having been in jeopardy, and the mistrial as an end virtually of the prosecution, or as equivalent to an acquittal, because he was not present when the jury were discharged, any more than it would have been if he had been present. It was still merely a mistrial by a failure of the jury to agree; moreover, *he was not prejudiced by the disregard of his constitutional right to be present at every stage of the trial, and in such case this Court will not reverse the judgment.*"
>
> Meece v Commonwealth, 78 Ky., 586.

In the case of Hite v. Commonwealth, 14 R., 308-9, where during the trial *appellant was compelled to leave the courtroom several times during progress of the trial (felony), and during which times the trial progressed,* and on appeal this was set up as a ground for reversal. In passing on this ground the Court said:

> "It seems that during the progress of the trial the appellant's stomach became so much disordered as to cause occasional vomiting, and the officer having him in charge was compelled to take him from the courtroom to let him vomit when the vomiting spells came on. The appellant contends here that the Court should have suspended the trial of the case until appellant could have gotten relieved of his sickness.
>
> "Now it is a fact that the appellant did not, by himself nor able counsel, ask the Court to suspend the trial until he recovered from his sickness. It is true that the counsel for the appellant privately called the attention of the Court to the fact that the appellant was suffering in the manner indicated, which the Court seems to have observed, and stated that he had sent for the jail physician to examine him, &c.

"The physician soon appeared and made an examination and gave the appellant some medicine, and reported that if the medicine acted favorably the appellant could proceed with the trial. The medicine did soon give relief, and the Court did proceed with the trial.

"*Now the fact is that appellant did not, by himself or counsel, move the Court to suspend the trial on account of the sickness of the appellant, and his inability to give the case proper personal attention on that account. Nor does it appear that the substantial rights of the appellant were in anywise prejudiced by progressing with the trial while he was sick.* He got over that sickness during the progress of the trial in time to look over what had occurred during his sick spell (it does not appear that the sickness made him oblivious to what had occurred during its continuance), and to remedy any omission that might have been made during the sickness and in consequence of it; *in fact none had occurred so far as the record shows.*"

In Williams v. Commonwealth, 78 Ky., 93, the Court also adopts the same rule, in construing said sections referred to, especially as to the beginning of the trial, and in so doing, said:

"A person is in legal jeopardy when he is put upon trial before a Court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, *and a jury has been charged with his deliverance.*"

Bishop on Criminal Laws, sections 1013, 1014.

Also see following cases cited in above, and to the same effect:

Tye v. Commonwealth, 3 R., 59.

Huff v. Commonwealth, 19 R., 1066.

Gaskins v. Commonwealth, 97 Ky., 496.

Under the foregoing decisions of the Kentucky Court

of Appeals and the interpretation and construction placed on section 183 of the Criminal Code, and section 11 of the State Constitution, the *trial of a felony case does not begin* under the criminal procedure in Kentucky until the jury is selected, sworn and charged with the deliverance of the accused; and as said in Willis v. Commonwealth, *supra,* "everything done previously, is merely preliminary to *the trial,*" and under this construction, regardless of the holdings of other Courts, *the trial had not begun when the juror, Alexander, was challenged by the Commonwealth and thereafter discharged by the Court;* and if the record showed that plaintiff in error was absent when the Court did question Alexander as to the alleged statement to Hackett—which we contend it does not—the plaintiff in error was not thereby denied any constitutional rights, and was not, and could not, have been prejudiced thereby.

XX.

CONSTRUCTION OF SECTION 281 OF THE CRIMINAL CODE OF KENTUCKY BY THE KENTUCKY COURT OF APPEALS.

Rutherford v Commonwealth, 13 Bush, 608.
Terrill v. Commonwealth, 13 Bush, 246.
Smith v. Commonwealth, 100 Ky., 135.
Collier v. Commonwealth, 110 Ky., 518.

Criminal Code, section 281:

> "The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

In Terrell v. Commonwealth, 13 Bush, 246, appellant relied mainly for a reversal of the judgment against him on the ground that the grand jurors by whom the indictment was found were not selected in the proper manner *as required by law.*

Upon this question the Court said:

> "Section 340 of the Code of 1877 provides: 'A judgment of conviction shall be reversed for any error of law, to the defendant's prejudice, appearing in the record.'
>
> "Sections 280 and 281 read as follows:
>
> "'Section 280. Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.'
>
> "'Section 281. The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for new trials, shall not be subject to exception.'
>
> "Construing these sections, 340 and 280 and 281, together, it seems clear to us that we have no power under the present Code to reverse on the appeal of either party for error in decisions upon challenges to the panel, or for cause, or upon motions to set aside an indictment, or for a new trial."

In Rutherford v. Commonwealth, 13 Bush, 608, the Court again construed section 281, Criminal Code, in connection with relative sections, and in the opinion said:

> "Section 340 of the Criminal Code provides, that 'a judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record.' But sections 280 and 281 provide that decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exceptions; and in Terrell's case (13 Bush, 246) we held, that as no exception could be taken to the decisions above enumerated, this Court

had no jurisdiction to inquire into alleged errors therein. *We are therefore of the opinion that we have no jurisdiction to revise the action of the circuit court in respect to the appellant's challenges for cause.*"

In Smith v. Commonwealth, 100 Ky., 137, the following language is used:

"A further objection is the refusal of the trial court to grant a new trial upon the affidavit of Polson as to the evidence which he states he had refused to disclose until after the trial. A sufficient answer to all of the objections mentioned is found in section 281 of the Criminal Code. 'The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment and upon motions for a new trial shall not be subject to exceptions.'"

Citing Terrell v. Commonwealth, 13 Bush.
Rutherford v. Commonwealth, &c., 13 Bush.

In Collier v. Commonwealth, 110 Ky., 518, the appellant was convicted, and on the prosecution of an appeal relied upon the following ground in connection with others:

"4th. That the motion and grounds for a new trial, and the affidavits in support thereof, should at least have been allowed to be filed, and been acted upon by the Court."

In passing upon this contention for reversal the Court said:

"*Section* 281 *of the Criminal Code gives to the trial court an unreviewable discretion in acting upon motions and grounds for new trials in criminal cases.* A defendant convicted of crime is entitled to file his motion and grounds for a new trial at any time before final judgment, and has the right to have the motion and the grounds passed upon by the trial court. *It is not enough that this Court may consider*

no ruling of said Court before the Appellate Court for review.

Said Court of Appeals had no jurisdiction to review the discharge of Alexander, under section 281 of the Criminal Code.

In Ex parte Spies, 123 U. S., 131 (31-91), this Court had under consideration the competency of a letter received by Spies from his co-conspirator, Most, which had been illegally seized by the officers, and said:

> "The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this Court. It was not made on the trial in the Court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police, and should have moved to exclude or oppose its admission on the grounds that it was obtained by such illegal seizure. This was not done, and therefore we can not consider the constitutional question supposed to be involved.
>
> "Even if the Court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under section 709 of the Revised Statutes, because of the denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the supreme court of the

State was reviewing the decision of the trial court, it must appear that the claim was made in that Court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioner, *a question of waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim.* If the right was not set up or claimed in the proper Court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and therefore no foundation is laid under this objection for the exercise of our jurisdiction."

XVIII.

EITHER GROUND SHOWN BY THE AFFIDAVIT OF HACKETT, ON THE MOTION AND CHALLENGE TO THE JUROR, ALEXANDER, IS SUFFICIENT, IN THE EXERCISE OF THE DISCRETION OF THE TRIAL COURT, FOR THE DISCHARGE OF ALEXANDER.

The case of Max Klinger v. Missouri, 80 U. S., 257 (20-635), was a case where plaintiff in error sought a reversal because the trial court discharged a juror over the objection of Klinger, after he had been accepted, but before the jury was sworn, because one juror, Andrew Park, refused to take the "Test Oath."

Upon his examination by the Court the juror stated and "declared that during the late rebellion he was a sympathizer with the Confederate cause, and earnestly

desired its success; that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the South; that his heart was with the Southern cause and that for these reasons he could not conscientiously take the proffered oath."

The Court, thereupon, of its own motion, over the objection and exception, and against the consent of said Klinger, discharged said juror.

In passing on this question the Court said:

> "Now it does not clearly appear from this statement there made that the juror was discharged 'for no other reason than that he declined to take the oath.' The reasons assigned by him for not taking the oath were twofold: First, that he was a rebel in his sympathies during the war; and, second, that he was so still, and stronger than ever. A man who makes such an avowal as that, thus manifesting a settled hostility to his country and its government, may well have been deemed by the Court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws.
>
> "Had the juror refused to take the oath simply because he had sympathized with or aided the rebellion during the war, and had he been discharged on that account, then the questions could have fairly arisen of which this Court could take cognizance. The repugnancy of the test oath to President Johnson's proclamation of amnesty, and to the prohibition against *ex post facto* laws, etc., would have been fairly brought into question. But as he also refused to take it because he was still a more bitter rebel than ever, the avowal of such a feeling was inconsistent with the loyal and upright discharge of his duties, as much so as if he had expressed his disbelief in the obligation of an oath, and had declined to take it for that reason. Surely if he had done that there

could have been no doubt that his discharge was justifiable, whatever view might be taken of the constitutionality of the test oath. It certainly would have been in the discretion of the Court, if not its duty, to discharge him. And so we think it was in this case.

"The rules which govern the action of this Court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the Court did in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this Court will not take jurisdiction, even though it might think the position of the State Court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one it will be presumed that the State Court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction. * * * In this case it appears that the Court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear but that he was discharged for that ground. It can not, therefore, with certainty, be said that the Supreme Court of Missouri did decide in favor of the validity of the said clause of the State Constitution, which requires a juror to take the oath."

So it is the contention of the State that while it does not appear from the record whether the trial court discharged Alexander, because he denied on his *voir dire*

that he had formed or expressed an opinion as to the existence of a conspiracy, and the guilt or innocence of the parties charged—including plaintiff in error—or because he had, almost immediately after being sworn and admonished by the Court not to talk to any one, including the other jurors about the case, disregarded his oath and the admonition of the Court, in saying to Hackett, "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," or whether it was for both.

Either ground was sufficient to authorize a court, in the impartial administration of justice and the law, to discharge any juror who would so conceal his bias, or show such utter disregard of his oath and the admonitions of the Court.

XIX.

UNDER THE COMMON LAW A TRIAL BEGAN WHEN THE CASE WAS OPENED FOR THE CROWN.

As to the time when a trial for a felony began, under the common law, we quote the following from Proffat on Jury Trials, section 208:

> "The mode of procedure in criminal cases, according to Chitty, was, that when a full jury had been obtained and sworn, the clerk directed the crier * * to count the jury, who having done so, said to the jury 'twelve good men and true, stand together and hear your evidence;' after which the other jurors summoned were discharged by the Court. Then the clerk directed proclamation to be made by the crier in the following form: 'If any one

can inform our lords, the king's justices, the king's sergeant, or the king's attorney on this inquest to be taken between our sovereign lord, the king, and the prisoners at the bar, of any treason, murder, felony, or other misdemeanor, committed or done by them, let them come forth and they shall be heard; the prisoners stand at the bar upon their deliverance, and all others that are bound by recognizance to give evidence against the prisoner at the bar let them come forth and give their evidence, or else they forfeit their recognizance.'

"*After this proclamation the trial commences by the prosecuting officer opening the case for the Crown.*"

So the Kentucky Court of Appeals hold that the trial begins when the jury is sworn and charged with the deliverance of the accused.

Under the construction given section 183 *of the Criminal Code the trial of an accused begins when the jury is sworn and charged with the deliverance of the accused; and it is only after the accused has been placed in legal jeopardy that he has a constitutional right to be present.*

Constitution of the Commonwealth of Kentucky, section 11, reads:

"In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law

These amendments of the Constitution of the United States are limitations and restrictions upon the powers of the Federal Government; and this Honorable Court has so often said that these amendments were no restrictions or restraints upon State action, in prosecutions for offenses against the State in State courts, that we feel sure there is no Federal question presented by either.

It is also claimed that section 281 of the Criminal Code of Kentucky is in conflict with his rights under the Constitution of the United States, the Constitution of Kentucky, the common law obtaining in Kentucky, and more especially in violation of amendments 5, 6 and 14 of said Constitution of the United States, *because same deprives the defendant (plaintiff in error) of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in a case of felony.*

Will the distinguished counsel point out the provisions in the Constitution of the United States, and the Constitution of the State of Kentucky, or of either, guaranteeing to the accused, in a felony case, in a trial in the State court, the right to except to the ruling of the trial court on a challenge to the panel, or to a juror for cause?

Or will he point out where such right existed at common law, and what tribunal existed then, for the review of said exceptions in such cases?

The right of appeal in Kentucky is not a constitutional right, but it is given by statute, and in conferring this right the State prescribed the terms and conditions upon which said right might be exercised and enjoyed; and by section 281 of said Criminal Code it denied the right of exception to the accused, in felony cases, upon the decisions of the trial court upon challenges to the panel, or to a juror for cause. No right has been guaranteed by either of said Constitutions, nor did any exist at com-

mon law, and being denied by the laws of Kentucky, it follows that plaintiff in error has no such right, and his conviction was due process of law, and he has had the equal protection of the law, and the alleged Federal question does not in fact or law exist.

It is also claimed that the construction given in the opinion of section 281, Criminal Code, is erroneous and prejudicial to the rights of the plaintiff in error, in this; that said section relates to challenges made to said jury before the acceptance of the jurors, *and not to challenges made after said jurors have been accepted by both parties.*

Section 202 of the Criminal Code of Kentucky, which reads: "It (challenge) must be taken before he (juror) is sworn in chief, *unless the Court, for good cause*, permit it to be made at any time before the jury is completed," authorizes this construction. Will the erroneous construction of a State statute by a State court, when such construction does not bring it in conflict with the United States Constitution, or laws, or any treaty thereof, constitute a Federal question for review by this Honorable Court?

It is also claimed that section 281, Criminal Code, relates to challenges made and heard in the presence of the accused, and not to challenges made or heard in the absence of the accused; and if said section is construed to apply to challenges either made or heard in the absence of accused, it is in conflict with the Constitution of the United States, the common law operative in Kentucky, and deprives the plaintiff in error of his liberty without due process of law, and in violation of the rights of trial by jury.

The challenge to the juror, Alexander, was neither made nor heard in the absence of plaintiff in error, as

shown conclusively elsewhere in this brief. As said by this Honorable Court in American Book Co. v. Kansas, 193 U. S., 613:

> "The duty of a court is to decide actual controversies by judgment, and not to give opinions on abstract or mooted questions."

But waiving this objection, if we apply the same test to this section as applied to section 7, we will fail to find any Federal question therein.

Upon this motion and petition for rehearing the Kentucky Court of Appeals filed its response (R., 78) which reads:

> "The questions called to our attention in the petition for rehearing under the Constitution of the United States were considered by the Court on the original hearing, and we adhere to the conclusion there reached, that no right of appellant under the fifth, sixth, or fourteenth amendment of the Constitution of the United States has been violated."

Hence, if we are correct in our conclusions, the Kentucky Court of Appeals correctly decided that the plaintiff in error had not been deprived of any right under the fifth, sixth or fourteenth amendments to the Constitution of the United States; that his conviction was had by due process of law, and that he had not been denied the equal protection of the laws.

XXIV.

HOW MUST A FEDERAL QUESTION BE MADE?

In the case of Columbia W. Power Company v. Columbia Street R. L. & P. Company, 172 U. S., 485 (43-525), the Court said:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a State court may be re-examined here:

(1.) "'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the *United States,* and the decision is *against* their validity.

(2.) "'Where is drawn in *question the validity of a statute of,* or an *authority exercised* under, any *State* on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is *in favor of* their validity.

(3.) "'Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege or immunity, *specially set up and claimed* by either party under such Constitution, statute, commission or authority.'

"There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this Court jurisdiction. (Spies v. Illinois, 123 U. S., 131.)

"But where the validity of a treaty or statute of the United States is raised and the decision is against it, *or the validity of a State statute is drawn in question,* and the *decision is in favor of its validity,* this Court has repeatedly held that if the Federal question appears on the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

Miller v. Nicholls, 4 Wheat., 311 (4-578).

In Harding v. Illinois, volume 25, No. 5, Supreme Court Reporter, 176, decided by this Honorable Court, Decem-

ber 19, 1904, the Court, by Mr. Justice Day, in reviewing this question said:

> "In the petition for allowance of a writ of error, and the assignment of errors in this Court, it is alleged that the supreme court of the State erred in holding that the constitutional objection had been waived. And the plaintiff in error appears to have put upon file here, without leave, the briefs and petition for rehearing below, in which it is insisted there is sufficient to show that the constitutional objection was not abandoned. But neither the petition for a rehearing or petition for writ of error in the State court after judgment or assignment of error in this Court *can supply deficiencies in the record of the State court, if any exist.* * * * Nor does the certification of the briefs by the clerk of the State Supreme Court, which are no part of the record, help the matter. * * * *We are to try the case upon the duly certified record, legally made in the State court, and upon which its decision rests.*"

The sixth reason assigned by the plaintiff in error in his motion and petition for rehearing is as follows:

> "6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:
>
> "'Section 281. *What not subject to exception—The* decisions of the Court upon challenges to the panel (a) and for cause (b) upon motions to set aside an indictment (c) and upon motions for a new trial (d) shall not be subject to exception,'
>
> "is in conflict with the rights of the defendant under the Constitution of the United States as well as the Constitution of Kentucky and the common law obtaining in this State, and more especially in violation of sections 5, 6 and 14 of said Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in a case of felony."

By this reason plaintiff in error says that section 281 of the Kentucky Criminal Code deprived him of *the right of exception* upon the challenges to the panel and for cause, upon the selection of the jury that tried him; that said section is in conflict with his rights under the Federal and the State Constitutions; his common law rights, and especially his rights under the 5th, 6th and 14th amendments.

We have, in our stumbling way, vainly looked into the Federal and the State Constitutions for a provision in either, whereby the right of exception to the decision of the trial court upon a challenge to the panel or for cause is secured to the accused; nor have we been able to find where at common law such right was secured, or what Court existed at common law to review such decision of the trial court.

It is the contention of the Commonwealth that section 281 of the Criminal Code of Kentucky is not in conflict with either the Federal or the State Constitutions, or with any provisions of either; that it is not in derogation of any right of plaintiff in error, at common law, and the construction and interpretation of the same by the Kentucky Court of Appeals does not deprive plaintiff in error of any right under any of said instruments.

XXV.

JURISDICTION OVER THE JUDGMENTS OF UNITED STATES COURTS AND STATE COURTS DIFFERENT.

The jurisdiction of the Supreme Court to review a judgment of conviction in the courts of the United States and in the courts of a territory, as in the case of Hopt v. Utah, supra, and the jurisdiction of said Court to re-

view a judgment of conviction on a writ of error to the highest State court, is widely different. In the former, the Supreme Court has jurisdiction to review any error, and reverse for same, while in the latter, said Court has no jurisdiction in the absence of a Federal question, and can only review such question.

Davis v. Texas, 139 U. S., 651 (35-303).

Jacobi v. Alabama, 187 U. S., 134 (47-107).

Howard v. North Carolina, Advance Sheet of S. C. R., volume 24, No. 2, page 49 (decided Nov. 16, 1903).

In Davis v. State of Texas, 139 U. S., 139 (35-303), wherein the Code of Texas was attacked as being invalid, the Court said:

> "In Culton v. Utah, 130 U. S., 83, we held that where the Code of Utah provided that imprisonment at hard labor in the penitentiary for life might be substituted for the penalty of death when the accused was found guilty of murder in the first degree, if the jury made a recommendation to that effect, the Court erred in not calling the attention of the jury to that provision of the statute, since it was not to be presumed that they were aware of their right to make such a recommendation; *but that was a case which came directly to us from the supreme court of the territory, and the inquiry related to the commission of mere error, and statutory provisions like those of Texas were not under consideration.* A writ of error *to review the judgment of the highest tribunal of a State stands on far different ground, and can not be maintained in the absence of a Federal question giving us jurisdiction.* The State courts rendered no decision in favor of the validity of a statute of, or authority exercised under, the State, drawn in question on the ground of repugnancy to the laws of the United States, nor was any title, right, privilege or immunity under such Constitution or statute specially set up or claimed in the case. *It is not within our province to pass upon any of the questions sought*

to be presented, as they fall entirely within the scope of the exercise of the powers of the State."
Jacobi v. Alabama, 187 U. S., 107.
Howard v. N. C., volume 24, No. 2, page 49, Sup. Court Reporter, cited above, and quoted.

XXVI.

DUE PROCESS OF LAW.

Due process of law in the States is that administration of justice therein which exists and is regulated by the laws thereof.

If the laws of Kentucky are not in conflict with, nor repugnant to the Constitution of the United States, nor the laws thereof, nor any treaty thereof, then there can be no legislative discrimination against the plaintiff in error, and unless there was judicial discrimination by the trial court of Kentucky against him, his conviction thereunder was, and is, due process of law.

At common law no right of appeal existed in capital cases. No right of appeal existed under the laws of Kentucky, in such cases, prior to 1854; this right of appeal was given upon certain terms and with certain limitations, and the same statute which gave the right to appeal, withheld jurisdiction from the Appellate Court to review, and denied to the accused the right to except to, or have reviewed, any decision of the Court set out in section 281 of the Criminal Code of Kentucky.

Will the distinguished counsel for plaintiff in error point out wherein said section 281 is in conflict with, or repugnant to, the Federal Constitution, any law of the United States, or any treaty thereof? Or will he be so kind as to point out the provision of the State Constitution which is in conflict with this section of the Criminal

the grounds insufficient; the Legislature has not seen fit to give this Court the right to pass on that question."

XXI.

RULE OF CONSTRUCTION IN FEDERAL COURTS.

The construction of said section by the Kentucky Court of Appeals is the rule of construction in the Federal Courts of the United States, as will be seen from the following case:

In Smiley v. Kansas, Supreme Court Reporter, volume 25, No. 8,291, decided in the Supreme Court of the United States, February 20, 1905, the Court said:

> "It is well settled that in cases of this kind *the interpretation placed by the highest court of the State upon its statutes is conclusive here.*
>
> *"We accept the construction given to a State statute by that Court. * * * Nor is it material that the State court ascertains the meaning and scope of the statute as well as its validity, by pursuing a different rule of construction from that we recognize.* * *
>
> *"We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined."*

The eighth error assigned by plaintiff in error in his motion and petition for rehearing is as follows:

> "8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence of the defendant, and not to challenges made or heard either in the absence of

> said defendant or after the juror had been selected and accepted by both the Commonwealth and the defendant, but he says that in the event said section is construed by this Court to apply to said state of case, then, that same is in conflict with the Constitution of the United States and the common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of his right of trial by jury."

Plaintiff in error construes said section 281, to refer to challenges made in felony cases in the selection of jurors in the presence of the accused, and before the juror has been selected and accepted by both parties, and that the construction of said section which permits a juror to be challenged, *for good cause*, after he has been tested and accepted by both parties, but before the jury is sworn, is in conflict with the Federal Constitution and the common law operative in this State, and plaintiff was by said construction deprived of his liberty without due process of law, and in violation of his right of trial by jury.

Section 202, Criminal Code, provides:

> "It (challenge) must be taken before he is sworn in chief, unless the Court *for good cause*, permit it to be made at any time before the jury is completed."

Section 212, Criminal Code, provides that:

> "Challenges shall be tried and determined by the Court in a summary manner, without the issues of law or fact arising thereon being reduced to writing, except when the Court disallows a challenge for implied bias."

From the two sections of the Criminal Code of Kentucky copied above it will be seen that the trial court was authorized to discharge Alexander after he had been

tested and accepted by both parties, but before the jury was sworn. Said Court is vested with the judicial discretion to determine what will constitute *a good cause.*

We have been unable to find any provision of the Federal Constitution, or law of the United States, wherein a rule of construction and interpretation is provided for the State courts of Kentucky in construing a State statute; or wherein any limitation is placed on her courts in construing her laws, except they be brought, by such construction, in conflict with the Constitution or laws of the United States.

The construction of her laws by her courts will be adhered to by this Court, as will be seen from its decisions and the authorities cited.

XXII.

THE FEDERAL COURTS WILL FOLLOW THE INTERPRETATION AND CONSTRUCTION GIVEN THE STATE STATUTES BY THE HIGHEST COURT OF THE STATE, AS TO RIGHTS, PRIVILEGES AND IMMUNITIES, UNLESS SUCH CONSTRUCTION IS VIOLATIVE OF THE FEDERAL LAWS.

The highest State court of Kentucky has, since 1854, uniformly held that an accused on trial for a felony has no right, under section 281, Criminal Code, to except to the decision of the trial court upon a challenge to a juror for cause; and that the decision of the trial court is final and conclusive on said question, and not subject to review.

This Honorable Court recognizes said State decisions as binding on it, as will be seen from the following cases:

Leeper v. Texas, 139 U. S., 462 (35-225).
Nobles v. Georgia, 168 U. S., 398 (42-515).
Bergman v. Baecker, 157 U. S., 655 (59-848).
Fielden v. Illinois, 143 U. S., 452 (36-226).
Brown v. New Jersey, 175 U. S., 172 (44-119).

In Leeper v. U. S., 139 U. S., 462 (35-225), we quote from syllabus:

> "Whether statutes of a State have been duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States. * * *
>
> "The validity of the enactment of the Texas Codes is not open to inquiry in this Court."

Again in Nobles v. Georgia, 168 U. S., 399 (42-515), the Court said:

> "A construction of State statutes by the Court of last resort of the State will be followed by this Court."

In the case of Bergman v. Baecker, 157 U. S., 655 (39-848), was before the Court on a motion for writ of *habeas corpus*, this Court, after quoting many State court decisions, said:

> "In view of these decisions (State court) declaring the meaning and scope of the statutes under which the accused was prosecuted, it can not be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the 14th amendment of the Constitution of the United States."

In the case of Fielden v. State of Illinois, 143 U. S., 452 (36-226), in which plaintiff in error contended because the Supreme Court of Illinois permitted the amendment of a record in his case, at a time when he was not present, either in person or by counsel, that he was convicted without due process of law. This Court held that such action was not a denial of the equal protection of the law, and that it was in conformity with due process of law, and said:

> "We take, as is our duty, the laws of Illinois to be as declared by its highest court." * * *

In the case of Brown v. State of New Jersey, 175 U. S., 172 (44-119), the Court said:

> "The decision of the highest court of a State, that a statute is not in conflict with the Constitution of the State, is conclusive on Federal courts."

XXIII.

MOTION AND PETITION FOR REHEARING.

(R., 74 and 75.)

The plaintiff in error was charged with an offense against the criminal laws of Kentucky, and under the indictment, arrest and appearance of plaintiff in error the trial court had jurisdiction of the offense and the plaintiff in error; and unless this record presents a Federal question, which has been decided in the highest State court having jurisdiction of it, adversely to him, this writ of error must be dismissed by this Honorable Court; and if it does present a Federal question, unless the substantial rights of the accused were prejudiced thereby, it will affirm the judgment of the State court.

It is asserted by plaintiff in error that the opinion of the Court of Appeals of Kentucky is in conflict with the Federal and State Constitutions as well as the statutes of the State of Kentucky. The able counsel for plaintiff in error has not cited us to either the Federal or State constitutional provision which the Kentucky Court of Appeals disregarded or ignored, nor has he cited us to the statute of said State which is in conflict with said opinion.

It is also claimed that said opinion is in conflict with, and in derogation of, the common law, operative in said State.

At common law one convicted of a felony had no right of appeal. Under the Criminal Code of Kentucky he may have the judgment of his conviction reviewed, but nothing more. How this *enlarged* right is in conflict with the common law, or in derogation thereof, or an opinion in review of his trial can be so, we would be glad for counsel to point out more definitely.

It is also claimed that said opinion is in violation of his rights under the Constitution of the United States, and especially under the 14th amendment thereof, because the ruling therein deprives him of his liberty without due process of law, and denies him the equal protection of the laws.

What right or rights specially set up in the State court does this opinion deprive him of, without due process of law, or wherein has said opinion denied to him the equal protection of the laws, and of which said Court had any jurisdiction to consider?

It is also claimed that said opinion is in violation of his rights as guaranteed him under the 5th and 6th amendments of the Constitution of the United States, because it deprives him of his liberty without due process of law.

may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion award execution or remand the same to the Court from which it was removed by the writ."

CONSTITUTION OF KENTUCKY (1850).

ARTICLE 4.

"Section 1. The judicial power of this Commonwealth, both as to matters of law and equity, shall be vested in one Supreme Court (to be styled the Court of Appeals), the courts established by this Constitution, and such courts, inferior to the Supreme Court, as the General Assembly may, from time to time, erect and establish.

"Section 2. *The Court of Appeals shall have appellate jurisdiction* ONLY, which shall be co-extensive with the State, *under such restrictions and regulations,* not repugnant to this Constitution, as may from time to time, be prescribed by law."

REVISED STATUTES OF KENTUCKY (1852).

CHAPTER 27, ARTICLE 1, SECTION 1.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:* That the Court of Appeals shall have jurisdiction, by appeal or writ of error, in matters of law, from the final order, judgment or decree of any inferior Court, except as otherwise provided in this Chapter.

"No appeal shall lie unless where the order, judgment or decree relates to an office, franchise or freehold, or is against a divorce, if the matter in

controversy does not amount in value to one hundred dollars, exclusive of interest and costs.

"*No writ of error or appeal shall lie in cases of felony.*" * * *

CRIMINAL CODE (1854).

BILLS OF EXCEPTION.

"Section 274. *Upon the trial of criminal* or penal prosecution, *either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.*

"Section 275. The DECISIONS *of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial,* SHALL NOT *be subject to exception.*

"Section 276. The *exception shall be shown upon the record, by a bill of exceptions,* prepared, settled and signed, as provided in the Code of Practice in civil cases."

APPEALS.

"Section 326. The *Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article.*

"Section 327. An appeal shall only be taken on a final judgment, except on behalf of the Commonwealth.

"Section 328. An appeal shall be taken by the defendant in the following manner only:

"1. The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court.

"2. The appeal shall only be allowed by a judge

of the Court of Appeals after an examination of a certified transcript of the complete record, and being thereupon satisfied that there are reasonable grounds for believing that errors to the prejudice of the defendant have been committed, for which the judgment should be reversed.

"3. The appeal is taken by lodging in the clerk's office of the Court of Appeals, within sixty days after the judgment, a certified transcript of the record, with the certificate of the allowance of the appeal indorsed on the transcript, under the signature of one of the judges of the Court of Appeals. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment.

"Section 329. If the judge of the Court of Appeals refuses an appeal, he shall indorse upon the record the words 'an appeal refused;' with his signature thereto, and forthwith transmit to the clerk of the the Court of Appeals a certificate of his refusal. After such refusal no appeal shall be taken, and if surreptitiously obtained afterwards, shall be immediately dismissed by the Court. * * *

"Section 333. A *judgment of conviction* shall only be *reversed* for the *following errors of law to the defendant's prejudice appearing on the record:*

"1. An error of the circuit court in admitting or rejecting evidence.

"2. An error in instructing or in refusing to instruct the jury.

"3. An error in failing to arrest the judgment.

"4. An error in allowing or disallowing a peremptory challenge."

PRESENT CONSTITUTION OF KENTUCKY.

"Section 7. *Trial by Jury Inviolate*—The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

"Section 11. In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

"Section 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a Court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"Section 110. The *Court of Appeals shall have appellate jurisdiction only*, which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, *as may from time to time be prescribed by law*. Said Court shall have the power to issue such writs as may be necessary to give it a general control of inferior jurisdiction.

"Section 233. All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, *nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly.*"

PROVISIONS OF CRIMINAL CODE OF PRACTICE.

"Section 171. *Demurrer Overruled, Defendant may Plead*—If the demurrer be overruled, the defendant has the right to plead to the indictment; if he fail to do so, final judgment shall be entered against him, and, if necessary, a jury impanneled to fix the punishment.

"Section 172. *Pleas that may be Entered*—There are but three kinds of pleas to an indictment:

"1. A plea of guilty.

"2. Not guilty.

"3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty.

"Section 173. *Plea of Guilty must be by Defendant in Person*—The plea of guilty can only be entered by the defendant himself in open Court.

"Section 174. *Plea of Guilty may be Withdrawn*—At any time before judgment the Court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

"Section 175. *Effect of Plea of not Guilty*—The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending

to establish a defense, other than a former conviction or acquittal, may be given in evidence under it.

"Section 183. *Defendant on Trial for Felony must be Present—Bail*—If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial; unless his bail appear personally in Court, and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. *If he escape from custody after the trial has commenced, the trial may either be stopped or progress to a verdict,* at the discretion of the Commonwealth's attorney; but judgment shall not be rendered until the presence of the defendant is obtained.

"Section 192. *Panel—How Filled*—When a juror is excused or a challenge to a juror is sustained the clerk shall draw the name of another juror to fill the panel until the list of standing jurors is exhausted, when the Court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury to be summoned by the sheriff, and the panel shall be filled from time to time from the jurors so summoned, and if they be exhausted, similar orders may be made for summoning other jurors, until the jury is completed.

"Section 193. *Court may Appoint Person to Summon Jury*—The Court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors, the officer or person designated being first duly sworn in open Court to discharge the duty faithfully and impartially.

"Section 194. *Jurors may be Summoned from Adjoining County*—If the judge of the Court be satisfied, after having made a fair effort, *in good*

faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free from bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed.

"Section 199. *Grounds of Challenge to Panel*—A challenge to the panel shall only be for a substantial irregularity, in selecting or summoning the jury, or in drawing the panel by the clerk.

"Section 201. *Challenge to Juror Peremptory or for Cause*—The challenge to the juror is either:

"1. Peremptory; or,

"2. For cause.

"Section 202. *Must be Made before Juror Sworn in Chief, unless by Leave*—It must be taken before he is sworn in chief, *unless the Court, for good cause, permit it to be made at any time before the jury is completed.*

"Section 203. *Peremptory Challenges Allowed Defendant*—The defendant is entitled to fifteen peremptory challenges in prosecutions for felony, and three in prosecutions for misdemeanor.

"Section 204. *Peremptory Challenges Allowed Commonwealth*—The Commonwealth shall be entitled to five peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor.

"Section 205. *Either Party may Challenge for Cause*—The challenge for cause may be taken either by the Commonwealth or the defendant.

"Section 206. *Challenge may be General or Particular*—It may be general, that the juror is disqualified from serving in any case, or particular. that he is disqualified from serving in the case on trial.

"Section 207. *Causes of General Challenge—Newspaper Accounts and Rumors*—Causes of general challenge are:

"1. Want of qualifications prescribed in the Kentucky Statutes.

"2. A conviction for a felony.

"Unsoundness of mind, or such a defect in the faculties of the minds or organs of the body as render him incapable of properly performing the duties of a juror. It shall not be cause of challenge that a juror has read in the newspaper an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: *And provided further,* That in the trial of any criminal case the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the Court shall be satisfied of the truth of such statement.

"Section 208. *Particular Causes of Challenge*—Particular causes of challenge are actual and implied bias.

"Section 209. *Actual Bias Defined*—Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case, or to either party,

Code? The 14th amendment grants no new right; it only protects the plaintiff in error in his existing rights, held under State law from impairment without due process of law.

In Hurtado v. People, 110 U. S., 516 (28-237), Justice Matthews in defining due process of law under the 14th amendment, said:

> "It refers to that law of the land, in each State, which derives its authority from the inherent and reserved powers of the State, exercised within those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

Section 281 of the Criminal Code of Kentucky not being in conflict with the Constitution, laws nor treaties of the United States, it follows, so long as the construction and interpretation of said section by the courts of Kentucky do not bring it within such conflict: *although such decision may be erroneous, its enforcement does not deprive the plaintiff in error of any right under either the State or Federal Constitutions, and is "due process of law."*

Section 281 of the Criminal Code of Kentucky was in force, and its interpretation settled by the Courts of Kentucky, before the adoption of the 14th amendment to the Federal Constitution, and the construction given it in the case of plaintiff in error was then, as now, due process of law.

In Anderson v. Henry, 45 W. Va., 319, the Court said of the 14th amendment:

> "It does not overthrow State laws, rights and remedies to the extent and purposes for which it is often cited. It respects the common law, the statute

> law, the remedies and proceedings existing in the State at its adoption. It came to preserve, not to destroy, existing rights."

The 14th amendment gives the Federal Government the power to enforce "due process of law" against arbitrary and unwarranted State actions, and nothing more.

In Hurtado v. California, 110 U. S., 516 (28-237), the Court said:

> "A trial by jury in suits at common law pending in *State courts,* is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the 14th amendment to abridge. A State can not deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to a settled course of judicial proceeding. *Due process of law is process according to the law of the land. This process in the States is regulated by the laws of the States.*"

In Kennedy v. Commonwealth, 14 Bush, 340, the Kentucky Court of Appeals in construing section 340 of the Criminal Code, as amended by Act of 1880, with reference to section 281, said:

> "We have no power to look into a bill of exceptions which the Legislature has declared should not be allowed, or into a general bill for matters not the subjects of exceptions, and then to reverse for an alleged error thus improperly appearing in the transcript. We must reverse for any error of law appearing in the record to the prejudice of appellant, but this only applies to such errors as the party had the right to manifest by bill of exceptions; and as a bill of exceptions, not only not authorized, but expressly forbidden by law, is no part of the record, an error in respect to any matters which, under sec-

tion 281, can not be excepted to, is not an error appearing *in the record* within the meaning of section 340."

This shows that the construction of said section, in the case of plaintiff in error, is the same general, usual and proper construction of said section by the courts of the Commonwealth since its adoption in 1854, and that he has been given the equal protection of the law, and his conviction was had by due process of law.

Does the due process of law prescribed by the 14th amendment, or the equal protection of the law defined therein, require of the State courts that in all criminal prosecutions therein, the accused shall be heard by himself and counsel, when he does not want to be heard; or that he shall stay in the courtroom and face the witnesses when he is willing to waive his presence; or that he shall be compelled to take out compulsory process for his witnesses; or may he not, as did plaintiff in error, waive a speedy, public trial; or may he not waive his presence when the trial judge asks a juror a question, either before or after the jury is sworn *without impairing any right secured to him by said amendment?*

Or does it require the State courts to interpret and construe its criminal laws so as to suit the taste of the accused?

These constitutional and statutory rights and privileges must not be denied to an accused on trial in the State court when he demands and asserts his rights thereto; but he is not compelled to assert them, and as held by many courts, he may waive them.

The courts of Kentucky have so held in many cases, and have never insisted on a literal compliance therewith, as will be seen from the cases cited herein.

EQUAL PROTECTION OF THE LAW.

From the State decisions of the Kentucky Court of Appeals cited elsewhere in this brief, it will be seen that the construction and interpretation of section 281 of the Criminal Code of Kentucky in this case, is the same construction and interpretation which has been given by her courts to said section in the trials of others charged with like offenses, since 1854.

That the decisions of the trial court upon challenges to the panel and to a juror for cause, are not subject to exception or review, and are final, is a consistent and uniform rule in the administration of the criminal laws of Kentucky; that, while the plaintiff in error is denied the right to except to such decisions of the trial court, and the Kentucky Court of Appeals is without jurisdiction to review, it is the same law that governs the trial of any and all accused of a violation of her criminal laws, and is therefore the equal protection of the law.

We ask that the judgment of the State court be affirmed, or this writ of error dismissed.

N. B. HAYS,
Attorney General.

CHARLES H. MORRIS,
Of Counsel.

APPENDIX.

CONSTITUTION OF UNITED STATES.

FIFTH AMENDMENT.

"*Criminal Proceedings Regulated—Private Property Protected*—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT.

"*Trial by Jury in Criminal Cases—Regulation of*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT.

"Section 1. *Citizens—Who are—State no Power to Abridge Rights of*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

"Section 5. *Congress to Enforce this Article*—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

UNITED STATES COMPILED STATUTES (1901).

"Section 709. (As amended 1875). *Judgments and Decrees of State Courts on Writ of Error—A final judgment* or decree in any suit *in the highest Court of a State, in which a decision in the suit could be had,* where is drawn in question the validity of a treaty or Statute of, or an authority exercised under, the United States, and the decision is against their validity; *or where is drawn in question the validity of a Statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution,* treaties, or *laws of the United States, and the decision is in favor of their validity;* or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority,

FILE COPY.

No. 77.

Supreme Court of the United States.

OCTOBER TERM, 1904.

Supreme Court U. S.
FILED
OCT 9 1905
JAMES H. McKENNEY,
Clerk.

JAMES B. HOWARD, ... Plaintiff in Error,

versus

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Motion of Commonwealth to advance; statement and notice to Plaintiff in Error.

N. B. HAYS,
Attorney General.

CHARLES H. MORRIS,
Of Counsel.

Geo. A. Lewis Publishing House Print.

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS MOTION TO ADVANCE.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

Comes now the defendant in error, The Commonwealth of Kentucky, and moves the Court to advance this case,, under United States Compiled Statutes, 1901, Section 710, and Rule 26, section 3 and 6; and that same be assigned for oral argument.

N. B. HAYS,
Attorney General of the
Commonwealth of Kentucky.

CHARLES MORRIS,
Of Counsel.

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS

COMMONWEALTH OF KENTUCKY, Defendant in Error.

STATEMENT.

The Writ of Error herein is to review a decision and judgment of the Kentucky Court of Appeals, affirming a conviction of the plaintiff in error, James B. Howard, for the murder of Hon. William Goebel, under and in pursuance to the Criminal Laws of the State of Kentucky, as follows:

1. Because plaintiff in error was, on April 17th, 1900, indicted by the Grand Jury of Franklin County, Kentucky, for the willful murder of Hon. William Goebel. He was tried and convicted on said charge in the year 1900, the jury having fixed his punishment at death. (Howard v. Commonwealth 110 Ky., 356.)

On appeal to the Kentucky Court of Appeals the judgment of conviction was reversed and he was given a new trial.

He was tried and convicted on said charge for the

second time in 1902, his punishment having been fixed by the jury at confinement in the penitentiary for life. (Howard v. Commonwealth, 114 Ky., 372.)

On appeal to the Kentucky Court of Appeals, this judgment was likewise reversed and he was given a new trial.

He was tried and convicted on said charge for the third time in April, 1903. This judgment having been affirmed by the Kentucky Court of Appeals, he now asks this Honorable Court, by writ of error to review the same.

2. Because we believe an inspection of the record will show the writ of error is merely for delay.

The Commonwealth of Kentucky, defendant in error, for the reasons set out herein, moves this Honorable Court to advance the case, and that it be assigned for oral argument to the earliest day convenient for the Court.

N. B. HAYS,
Attorney General for the
Commonwealth of Kentucky.

CHARLES MORRIS,
Of Counsel.

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS NOTICE.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

To James B. Howard:

Please take notice that on the 9th day of October, 1905, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, at motion hour, in the Court Room of said Court, Washington, D. C., for the decision of the Court thereon.

Annexed hereto is a copy of my statement or argument in support of said motion.

N. B. HAYS,
Attorney General of the
Commonwealth of Kentucky.

as satisfies the Court, in the exercise of a sound discretion, that he can not try the case impartially and without prejudice to the substantial rights of the parties challenging.

"Section 210. *Implied Bias—What is*—A challenge for implied bias may be made:

"1. If the juror be related by consanguinity, or affinity, or stand in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or be a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

"2. If he be adverse to the defendant in a civil suit, or have complained against or been accused by him in a criminal prosecution.

"3. If he have served on the grand jury which found the indictment, or on the coroner's jury which inquired into the death of the party whose death is the subject of the indictment.

"4. If he have served on a trial jury which has tried another person for the offense charged in the indictment.

"5. If he have been one of a former jury sworn to try the same indictment, and whose verdict was set aside, or who were discharged without a verdict.

"6. If he have served as a juror in a civil action brought against the defendant for the act charged in the indictment.

"7. When the offense is punishable with death, if he entertain such conscientious opinions as would preclude him from finding the defendant guilty.

"Section 211. *Exemption from Service no Ground for Challenge*—An exemption from serving on a jury is not a cause of challenge.

"Section 212. *Challenge Tried by Court—How Determined—Challenges shall be tried and determined by the Court in a summary manner, without the issues of law or fact arising thereon being reduced to writing*, except when the Court disallows a challenge for implied bias.

"Section 213. *The Juror may be Examined on Challenge*—The juror may be examined on oath by either party, upon the challenge.

"Section 214. *Other Witnesses may be Examined*—Other witnesses may also be examined and their attendance coerced.

"Section 215. *Commonwealth to Challenge First—Practice*—The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins.

"Section 216. *Order of challenges*—The challenges of either party need not be taken all at once, but separately, in the following order:

"1. To the panel.

"2. To the juror for general disqualification.

"3. To the juror for implied bias.

"4. To the juror for actual bias.

"5. Peremptory.

"Section 229. *Defendant to Remain in Custody During Felony Trial*—During the trial of an indictment for felony the defendant shall be committed to and remain in the custody of the proper officer.

"Section 236. *View of Place offense Committed*—When, in the opinion of the Court, it is necessary that the jury should view the place in which the offense is charged to have been committed, or in which

any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers (and accompanied by the judge, prisoner and counsel for each side) to the place, which must be shown to them by the judge, or by a person appointed by the Court for that purpose. The officers must be sworn to suffer no person to speak to, or communicate with, the jury on any subject connected with the trial nor do so themselves, but shall merely show the place to be viewed, and return them into Court without unnecessary delay, or at a specified time.

"Section 250. *Sickness of a Juror Before Jury Completed*—If, after a juror has been accepted, but before the jury has been completed, one of the accepted jurors becomes so sick as to prevent the continuance of his duty, the Court may excuse such juror, and complete the formation of the jury as if he had not been orginally accepted.

"Section 251. *Discharge of Jury—Sickness of Juror*—If, after retirement, one of the jurors become so sick as to prevent the continuance of his duty, or other accident or cause occur, preventing them being kept together, or if, after being kept together such a length of time as the Court seems proper, they do not agree in a verdict, and it satisfactorily appear that there is no probability they can agree, the Court may discharge the jury; or if the sickness of the juror be temporary, the Court may permit him to separate from the other jurors, and may place him in charge of an officer or not, in its discretion.

"Section 280. *Decisions Subject to Exception—Upon the trial of criminal* or penal *prosecutions, either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.*

"Section 281. *Decisions not Subject to Exception* —The *decisions of the Court upon challenges to the panel*, and *for cause*, upon *motions to set aside an indictment*, and upon *motions for a new trial, shall not to be subject to exception.*

"Section 282. *Exception Noted of Record—Preparation of Bill*—The *exception shall be shown upon the record by a bill of exceptions, prepared, settled and signed, as provided in the Code of Practice in civil cases.*

"Section 340. *Errors that Authorize Reversal of Judgment of Conviction*—A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

CIVIL CODE OF PRACTICE.

"Section 333. 1. An exception is an objection to a decision of the Court upon a matter of law.

"2. *A party may, without a previous objection, except to a decision against him, unless it be made at the instance of the adverse party.*

"3. *But a party can not except to a decision made at the instance of the adverse party, unless objection shall have been made to the motion, offer or request of the adverse party.*

"Section 334. The *party objecting must except when the decision is made;* and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the Court."

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Office Supreme Court U. S.
FILED
JAN 29 1906
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

NO. 77.

JAMES B. HOWARD, ... Plaintiff in Error,

versus

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

Objections of the Commonwealth of Kentucky to motion of Plaintiffs in Error to suspend the issuance of mandate.

Geo. A. Lewis Publishing House Print, Frankfort, Ky.

Supreme Court of the United States

JAMES B. HOWARD, Plaintiff in Error,

vs. No. 77.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

The Commonwealth of Kentucky objects to the motion to suspend the issuance of the mandate herein.

REASONS.

Hon. William Goebel was assassinated on January 30th, 1900. The Plaintiff in Error, James B. Howard, was indicted as the principal for said murder on April 17th, 1900; he has been tried and convicted by three separate juries for said offense, two of which convictions were reversed on technical grounds by the Supreme Court of the State, and the third and last conviction was by said Court affirmed. He prosecuted an appeal by writ of error to this Honorable Court, which was affirmed on January 2d, 1906.

More than six years have elapsed since the assassination of Governor Goebel, due largely to the efforts of the Plaintiff in Error to defeat and delay the penalty of the law.

As the representative of the Commonwealth, we feel that many of the crimes in the Commonwealth

are due to the law's delay, and that its dignity and majesty consist in its uniform application and enforcement.

Wherefore, the Commonwealth objects to said motion, and asks that same be overruled and the mandate of this Court be issued as provided by law.

N. B. HAYS, Att'y Gen'l.
For Commonwealth of Kentucky.

Supreme Court of the United States.

No. 77.—October Term, 1905.

James B. Howard, Plaintiff in Error, vs. The Commonwealth of Kentucky. } In error to the Court of Appeals of the State of Kentucky.

[January 2, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

The plaintiff in error seeks to review the judgment of the Court of Appeals of the Commonwealth of Kentucky, affirming a conviction and sentence of murder against him. He was indicted, with others, for killing one William Goebel. The grounds of review by this court are based upon certain rulings of the trial court which, plaintiff in error contends, were repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

It appears from the record that eleven jurors, including one J. C. Alexander, had been accepted by the parties. The Commonwealth had exhausted three of its peremptory challenges, and plaintiff in error eleven of his—he was given by the statutes fifteen. At this point the Commonwealth's attorney suggested that Alexander had formed and expressed an opinion on the merits of the case, and had improperly conversed with a person, not a member of the jury, on a subject connected with the case. The Commonwealth's attorney then made a motion to discharge Alexander from the jury, in support of which he filed the following affidavit of one Ben Hackett, who had been excluded as a juror in the case:

"The affiant Ben Hackett says that after the killing of William Goebel he and Mr. J. C. Alexander, who has been accepted on the jury to try this case, had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him—these arguments and conversations occurred at different times and places in Woodford County during the time that has elapsed since the murder of Mr. Goebel—were frequent and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

"This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case and after this affiant had been excused, after those accepted as jurors had been charged and admonished by the court, immediately after adjournment for supper,

and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were passing out through the court house yard, when in passing Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off this jury, as I did not want to serve on this jury with you.'

"Affiant Ben Hackett says the foregoing statements are true.

(Signed) BEN F. HACKETT."

The following proceedings were then had as appears from the order of of the court from which we quote:

"It was agreed by counsel on either side that the court might, in the absence of the defendant and counsel, question the said Alexander as to the truth of the said statements, contained in said Hackett's affidavit, that he said to said Hackett while in the custody of the sheriff, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you,' and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of said Alexander was a violation of the admonitions of the court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged; and the court being thus advised, overruled defendant's objection and discharged and excused said Alexander, and defendant by counsel excepts.

"Thereupon defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court being advised, sustained said objection, and refused to discharge said entire panel, to which ruling defendant by counsel excepts."

By these rulings, it is contended, that plaintiff in error was deprived of due process of law. Error is assigned under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff in error cannot avail himself of the provisions of the Fifth and Sixth Amendments, for reasons we have so often expressed that it would be the extreme of superfluity to repeat them. It is enough to say that those amendments do not apply to proceedings in the State Courts. The invocation of the Fourteenth Amendment is attempted to be justified on two grounds: (1) That the trial court in discharging Alexander acted beyond its power, and that the Court of Appeals of Kentucky in holding, that by reason of section 281 of the Criminal Code of the State, it cannot reverse on account of such error, deprive plantiff in error of his liberty without due process of law. (2) By the common law which has been adopted by Kentucky, and by the constitution and statutes of the State an accused has not only the right to be present, but must be present during the whole of the trial. "His presence is not only an inalienable right, but a jurisdictional fact and cannot be waived."

The argument of plaintiff in error is very elaborate, but there is scarcely any phase of it which has not been answered adversely to his contention by decisions of this court.

He seems to make an issue with the Court of Appeals of the State upon the law of the State, and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *In re Converse*, (137 U. S. 624, 631,) and other cases, which hold "that a State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State —common, statutory and constitutional. Our inquiry can only be, did the State law as applied afford plaintiff in error due process as those words are used in the Fourteenth Amendment? We think it did. It is not necessary to enter into a lengthy discussion of what constitutes due process of law. That has been done in a number of cases and there is nothing in the present case which calls for a repetition and an extension of the discussion. It may be admitted that the words "due process of law," as used in the Fourteenth Amendment, protect fundamental rights. What those are cannot ever be the cause of much dispute. In giving them protection, however, it was not designed, as was observed by the Chief Justice in *In re Converse*, *supra*, "to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State." These words are apposite in the present case. Of what does plaintiff in error complain? The discharge of a juror before he was sworn and the absence of the plaintiff in error from the examination of the juror by the presiding judge. But plaintiff in error consented through his counsel to the examination, and there is not an intimation that the juror selected in Alexander's place was not as competent as he. Nor can we say that the discharge of Alexander took from the other jurors who had been chosen their competency to try the case or to give to plaintiff in error the right to a new panel. In *Hayes* v. *Missouri*, (120 U. S. 68,) it was said "the accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. (*Northern Paaific Railroad* v. *Herbert*, 116 U. S. 642.) The right to challenge is the right to reject, not to select a juror. If from those that remain an impartial jury is obtained, the constitutional right of the accused is maintained." (*Brown* v. *New Jersey*, 175 U. S. 172.)

In passing on the action of the trial court in examining Alexander in the absence of plaintiff in error the Court of Appeals said that the court had been compelled to relax the rule prescribed by the statute that "The defendant must be present and shall remain in custody during trial," and cited *Hite* v. *Commonwealth*, (14 Ky. L. R. 308;) *Meece* v. *Commonwealth*, (78 Ky. 586.) In the first case absence from the court

room by the accused for a few minutes at a time on account of sickness, the trial continuing in his absence, it was held did not prejudice the substantial rights of the accused.

In *Meece* v. *Commonwealth*, upon the jury coming back to the court room for further instructions, the court made certain alterations in the instructions in absence of the accused but in the presence of his counsel. It was held not to be error, the court saying:

"While we recognize the fact that the accused when on trial for a criminal offense should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence either before or after the submission of the cause to the jury, still this court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a crimnal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist except by the legislation of the State on the subject, and when permitting an appeal the lawmaking power has the right to determine for what cause a reversal may be had. . . ."

The Court of Appeals also said, in passing on the contention of plaintiff in error, based on the examination of Alexander:

"It has also been held by this court that a trial for felony begins when the jury is sworn. (*Willis* v. *Commonwealth*, 86 Ky. 68.) At the time the examination of Alexander took place and when he was discharged, the jury had not only not been sworn, but it had not been completed.

"There are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive, such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jurors to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantiul rights of the appellant by Alexander's dismissal from the jury."

It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial, from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

It will be observed that the Court of Appeals also decided that, even though the exclusion of Alexander had been error, a reversal of the case was forbidden by section 281 of the Criminal Code of the State, and cited *Curtis* v. *Commonwealth*, (23 Ky. L. R. 267;) *Turner* v. *Commonwealth*, (not reported;) *Alderson* v. *Commonwealth*, (25 Ky. L. R. 32.) See also *Commonwealth* v. *Powers*, (114 Ky. 237) where section 281 was construed the same way. The court, in its construction of section 281, followed the construction established by prior cases, and did not make a discriminating application of that section against plaintiff in error. He was, therefore, not deprived of the equal protection of the laws.

Judgment affirmed.

Mr. Justice HARLAN, concurring: The record does not, in my judgment, show an absence of the due process of law enjoined by the Fourteenth Amendment of the Constitution of the United States, as that Amendment has been interpreted by this court. For that reason, and without approving all that is said in the opinion of the court, I concur in the judgment of affirmance.

True copy.

Test:

Clerk Supreme Court, U. S.